In the

Supreme Court of the United States

October Term, 1939

No. 789

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

Petitioner,

v.

GORDON BROWNING, ET AL., CONSTITUTING THE STATE BOARD OF EQUALIZATION OF TENNESSEE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BAIRD-WARD - NASHVILLE

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May It Please the Court:

Pursuant to the rules of the Supreme Court of the United States, Rule 7, sec. 3, respondents herewith submit their brief in opposition to the jurisdiction of the Court to grant the writ of certiorari prayed for in this cause by the the petitioner, the Nashville, Chattanooga & St. Louis Railway.

STATEMENT OF THE CASE

The petition for writ of certiorari in this cause involves the validity of the assessment of the property of the Nashville, Chattanooga & St. Louis Railway by the State of Tennessee

for ad valorem taxation for the years 1938-1939. No other railway or railways operating in the State of Tennessee are here involved, nor did the other railways participate in any manner in this litigation in the courts of Tennessee.

The Nashville, Chattanooga & St. Louis Railway is a valuable railway property, with main line mileage of 1115.35 miles. Of this main line mileage 800.02 miles, or 71.73%, is located in the State of Tennessee. The remaining 315.33 miles, or 28.27%, is located in the states of Alabama, Georgia and Kentucky. The assessment of the property of this particular Railway *has been reduced from $26,000,000 in 1929-1930 to $16,223,194 in 1938-1939.* (R., p. 132.)

The assessment of the Railway's property for the years 1938-1939 of which the Railway complains in this cause *represents a reduction of $276,804 less than the assessment made for the previous years of 1936-1937.* (R., p. 132.)

Reductions of assessment amounting to approximately $10,000,000 have been granted to this Railway by the State of Tennessee during the past ten years. (R., p. 132.)

The Court's attention is invited to a clear and accurate map of the Railway, which shows the extended scope of its operations from the standpoint of geography and density of population. From said map (R. 500C) it is readily seen that the Railway operates between and serves such important centers of population and trade as Memphis, Tennessee; Nashville, Tennessee; Chattanooga, Tennessee; Atlanta, Georgia; Paducah, Kentucky; Hickman, Kentucky, and many other smaller but important towns and cities.

It is not insisted by petitioner that there have been any recent changes in the statutes of Tennessee relative to the assessment of property for ad valorem taxation. No peculiar circum-

stances exist showing that this Railway has suffered any greater decrease in value than other railroads generally in the United States. As stated before, however, the record does show that the assessment of petitioner's property has been consistently reduced by the State of Tennessee to the extent of approximately 40% less than the assessment of 1929-1930.

The following former valuations were not made the basis for the 1938-1939 assessment, but do reflect and conclusively demonstrate the consistency with which large reductions of assessment have been enjoyed by this Railway:

"1923-1924	$24,000,000
1925-1926	24,795,303
1927-1928	24,795,303
1929-1930	26,000,000
1931-	23,750,000
1932-1933	17,000,000
1934-1935	16,999,966
1936-1937	16,499,998
1938-1939	16,223,194"

(R., p. 132.)

The Railroad & Public Utilities Commission valued the distributable property in Tennessee (800.02 miles) at $12,926,944, which had the effect of valuing the distributable property of petitioner in Tennessee at $16,158 per mile. The Railway contends that it should have been fixed at $9,007 per mile.

The record reveals that the assessment per mile of petitioner's property as compared to the assessment per mile of other railroads operating in Tennessee is highly favorable to petitioner. From R., p. 97 it is shown that:

The Louisville & Nashville Railroad was assessed at $34,683.00 per mile, and that that railroad did not appeal to the State Board of Equalization.

The Southern Railway Company, $21,251.00 per mile.

Harriman and Northeastern Railroad, which is not even a Class I railroad and which operates from Harriman to Petros, was assessed at $12,000.00 per mile.

East Tennessee and North Carolina Railroad, which is a narrow gauge road operated from Johnson City to a point in North Carolina, $12,000.00 per mile.

Mobile and Ohio Railroad, which at the time of assessment was in the hands of receivers, $15,000.00 per mile.

Gulf, Mobile and Northern Railroad, $12,000.00 per mile.

Illinois Central Railroad, $46,451.00 per mile.

Kansas City, Memphis & Birmingham Railroad, which is now in the hands of receivers, $26,183.00 per mile.

Clinchfield Railroad, which has not for years earned its fixed charges, $40,000.00 per mile. This railroad did not appeal to the State Board of Equalization.

(R., p. 97.)

Under Tennessee statutes the Railroad & Public Utilities Commission is directed by statute (Code sec. 1508) (Appendix p. 44) to assess for taxation for State, county and municipality property of every description, tangible and intangible, within the State belonging to railroad companies and other named public utilities. It is provided that the Commission shall assess all of such property biennially, in even years, at its actual cash value as of the same date the properties of other persons are by law assessed. The owners of property assessable under the statute are required by Code sec. 1509 (Appendix p. 45) to file with the Commission sworn schedules and state-

ments of certain information. Section 1526 of the Code is as follows:

> "Upon examination of every such schedule and statement and all other evidence taken by them, the said commission shall proceed to ascertain and determine the value of said property within the state for taxation and assess the same accordingly, taking into consideration the *capital stock, corporate property, franchises,* and *gross receipts,* the *market value of the shares of stock* and *bonded indebtedness,* and *such other evidence as is afforded by said statements and schedules or other evidence taken* to enable them to fairly and equitably fix the actual cash value of the properties of such persons."

The Railway filed its return with the Commission and after considering same, together with other evidence, the Commission fixed the cash value of the Railway's property in Tennessee for taxation at $16,223,199 for the biennium 1938-1939. (R., p. 37.)

The Railway filed numerous exceptions to the assessment (R., 150-190) which were denied after a full hearing and the Railway prayed and was granted an appeal to the State Board of Equalization. The statute (Code 1533) (Appendix p. 46) provides that the Commission shall file with the Board of Equalization the assessments made by them, together with such records as may be deemed necessary.

The State Board of Equalization in Tennessee is composed of the highest administrative officials of the State, to-wit: the Governor, Secretary of State, State Treasurer, State Comptroller and Commissioner of Finance and Taxation (a majority constituting a quorum.) (Code sec. 1448.) (Appendix p. 38.)

The Code, sec. 1534 (Appendix p. 47) provides that the Board shall proceed to examine the assessments so made and

are authorized to increase or diminish the valuation placed upon any property valued by the Commission and are further authorized to request of the Commission additional evidence touching the property assessed; that if the Board so desire they have the power without referring any assessments to the Commission, themselves to employ experts, accountants, and to call witnesses to testify upon any assessment certified to them by the Commission and to call upon the Interstate Commerce Commission for any valuation of property in the office of such Commission; that the assessments shall not be deemed complete until corrected and approved by the Board.

Under Code sec. 1535 (Appendix p. 48) the Board is required to certify to the Railroad and Public Utilities Commission the valuation fixed by them upon each property assessed and the action of the Board "in fixing valuation upon such property shall be conclusive and final and the valuation so fixed shall be assessed against said property and the taxes due thereon be paid."

The Board of Equalization reviewed the assessment of the Railway's property upon the entire record sent up by the Railroad Commission, together with additional evidence which the Railway was permitted to introduce (R., p. 94), and after argument of counsel the Board approved the assessment. Befor the Board certified back to the Commission the amount of the assessment as approved, the Railway filed its petition for writs of *certiorari* and *supersedeas* in the Circuit Court of Davidson County. The Circuit Judge, upon motion of the Board, taking into consideration the entire record as certified to the Circuit Court by the Board, dismissed the petition for *certiorari* and discharged the *supersedeas*.

From this action of the Circuit Court the Railway appealed to the Supreme Court of Tennessee. The Supreme Court of

Tennessee affirmed the judgment of the Circuit Court. Two members of the Supreme Court of Tennessee dissented from the majority opinion and each has filed a separate dissenting opinion. (R., pp. 135 and 138.) *Neither of the dissenting opinions referred to are in any sense based or predicated upon a Federal question.*

For the convenience of the Court and supplementary to the above statement of the case, we are particularly including in the appendix to this brief (1) the assessment by the Railroad & Public Utilities Commission, (2) opinion of the State Board of Equalization, (3) opinion of the Circuit Court of Davidson County, Tennessee, (4) opinion of the Circuit Court of Davidson County, Tennessee, on motions for new trial, (5) opinion of the Supreme Court of Tennessee, (6) and (7) dissenting opinions of Justices McKinney and Chambliss, (8) opinion on petition to rehear of the Supreme Court of Tennessee.

In conclusion of our statement of the case, we deem it proper to mention that in addition to the parts of the record contained in the "printed" transcript of the record, there is also a vast amount of technical data contained in the record which was presented to and considered by the taxing officials and courts of Tennessee, but which neither counsel for petitioner nor respondents considered of sufficient importance to designate for printing upon this petition for *certiorari*.

BRIEF AND ARGUMENT

I.

THE REDUCED ASSESSMENT OF WHICH PETITIONER COMPLAINS WAS LAWFULLY MADE AND WAS NEITHER ARBITRARY NOR EXCESSIVE.

Counsel for respondents are fully aware of the rule that the denial of a petition for *certiorari* is in no sense binding upon this Court and is not regarded as authority. However, when one or more petitions for *certiorari* involving almost identical questions have very recently been presented to and denied by the Court, we deem it our duty to call the Court's attention to same.

The "New Jersey Railroad assessment cases" hereinafter referred to were so recently published that respondents did not have the benefit of the opinions in the Tennesse courts.

This Court within the last year has had occasion to fully consider contentions substantially similar to those here made by the petitioner, in a suit involving the assessment by the State of New Jersey of taxes on the properties of numerous railroads operating therein. Indeed ,twice within the last six years the railroads of New Jersey have brought their alleged grievances to this Court, each time with the same result. Because of the striking similarity between the petitioner's contentions and those made by the railroads of New Jersey in their unsuccessful litigation, we here review briefly, for the convenience of the Court, the history of that litigation.

In 1932 the Central Railroad Company of New Jersey brought in the State Courts proceedings for a writ of *certiorari* to review a judgment of the State Board of Tax Appeals dis-

missing a complaint filed by the Railroad. The claimed ground for the relief sought was that the property of the petitioning Railroad was assessed at 100% of its true value while all other property throughout the State was assessed at not more than 60% of its true value. The Railroad attempted to support its claim with a type of evidence quite similar to that offered by the petitioner in the instant case. In *Central Railroad Company of New Jersey* v. *State Tax Department, et al.*, 112, N. J. Law, 5, 169 A. 489, the New Jersey Court of Errors and Appeals affirmed a judgment of the Supreme Court dismissing the Railroad's suit. The Railroad attempted to bring its suit to this Court, but *certiorari* was denied, *Central Railroad Co.* v. *State Tax Commission*, 293 U. S., 568, 79, L. Ed., 667.

Soon thereafter, all of the railroads operating in New Jersey with the exception of one brought new proceedings in the State Courts to review assessments made on their properties by the State taxing authorities for the year 1933. This time their grounds of complaint were two: in addition to insisting that the State authorities were assessing their property at its true value while assessing all other property at much less than its true value, the railroads contended that the State's method of assessment was fundamentally wrong in that neither the "stock and bond" method, nor the "capitalization of net earnings" method, nor a combination of these two methods, was employed in arriving at the value of the railroad's property. In *Central R. Co. of New Jersey* v. *Thayer Martin*, 114, N. J. Law 69, 175 A. 637, the Supreme Court of New Jersey sustained the assessments which had been made by the State taxing authorities and dismissed the railroads' suits.

The New Jersey railroads then resorted to the Federal District Court, and sought therein an injunction to restrain the

State taxing authorities from collecting taxes which had been assessed on the railroads' properties in the same manner as in the cases previously litigated in the New Jersey State Courts. The railroads' insistences in the injunction suit were the same as in the case of *Central R. Co. of New Jersey* v. *Thayer Martin*, 114 N. J. Law 69 175 A. 637. In *Lehigh Valley R. Co. of New Jersey, et al.* v. *Martin*, (December 1936) 19 F. Supp. 63, the District Court dissolved the temporary injunction theretofore granted and dismissed the suits of the railroads. The decree of the District Court was affirmed by the Circuit Court of Appeals for the Third Circuit in *Lehigh Valley R. Co. of New Jersey* v. *Martin*, 100 F. (2d) 139. These suits were finally terminated when this Court on March 13, 1939, denied *certiorari* and on April 17, 1939, denied a petition for rehearing, *Lehigh Valley Railroad Company of New Jersey, et al.* v. *Thayer Martin, et al.*, 306 U. S., 651, 83 L. Ed., 1049.

It is our very earnest insistence that the case of the petitioning railway in this suit is much weaker on its facts than was the case of the railroads involved in the New Jersey litigation. We therefore place much reliance upon the very recent action of this Court in denying *certiorari* in the New Jersey cases, and will refer to these cases in more detail hereinafter.

VALID METHOD OF VALUATION USED IN INSTANT CASE

The Railroad & Public Utilities Commission of Tennessee is required by statute (Code, sec. 1526, Appendix p. 46) to take into consideration certain recognized factors in making an assessment of railway property, to-wit: capital stock, corporate property, franchises, gross receipts, market value of shares of stock and bonded indebtedness, and such other evidence as is afforded by said statements and schedules, or other evi-

dence taken to enable them to fairly and equitably fix the actual cash value. However, under no statute and under no decision is there any inflexible, arithmetical rule of assessment.

In making the assessment involved herein, the Commission followed the provisions of the Tennessee statute above referred to and in their assessment (R., p. 37) stated:

> "In valuing the property of the corporation for the purpose of taxation we will look to and consider the *capital stock, corporate property, franchise and gross receipts, the market value of the shares of stock and bonded indebtedness, and all evidence as are afforded by the returns, statements and schedules made by the respondent, together with such other evidence taken* as to enable this Board to fairly and equitably fix the actual cash value of the property to be assessed, making due allowance for all non-taxable securities held."
>
> Assessment by Commission, (R., p. 37.)

It was the original position of the petitioner before the assessing bodies and the courts of Tennessee that the valuation of its property should be based upon its net earnings or capitalization of its net income. It was also urged by petitioner that the value of its property should be fixed by a capitalization of its net income at the rate of 6%—this to the practical exclusion of the other recognized elements of value.

In support of the above statement, we refer the Court to adversary counsel's statements before the Railroad Commission as follows:

> "I believe it is to fix the base entirely on the earnings." (R., p. 153.)

> "I say, the earnings measure is the only measure the commission could ever adopt in order to get that. There are other tests, but in the final analysis, I believe I am

right, you will find it is the earnings value that taxing boards are trying to get at."

(R., pp. 154-155.)

"* * earnings or the general figures, after all, I take it is the earnings that is the value of the property."

(R., p. 155.)

"The earnings, by the present earnings is the only fair and reasonable and accurate method of reaching the system's worth."

(R., p. 156.)

Despite petitioners' present position before this Court upon the method of ascertaining value, the Supreme Court of Tennessee recognized the above insistence of the petitioner and understood that petitioner was insisting for a valuation based upon a capitalization of its net income at 6%, for it is commented upon in the opinion of the Court. The Supreme Court of Tennessee said:

"It is contended for the Railway that the Commission and Board should have made the assessment on the basis of capitalization of net income at a rate which would measure a fair return to the investor in the property, or at least that such method should have been made the predominant factor in arriving at the value of the property. * * * *The insistence is that if this average net income be capitalized at 6%, a value of $16,021,298 is shown for the entire system as compared with $23,996,604.14 fixed in the assessment.*"

R., pp. 126-127, Appendix, pp. 75-76.

Respondents submit that the Railroad Commission and the State Board of Equalization did not act illegally by failing to adopt the particular formula of assessment (capitalization of net income at 6%) advanced by the Railway to the practical exclusion of other equally recognized factors. The respondents assert that every element of valuation set forth in Code

sec. 1526 (Appendix p. 46) has been approved in numerous cases by this Court as being a proper element in ascertaining the value of railway property, and those elements were taken into consideration by the assessing bodies of Tennessee in order to fairly and equitably fix the actual cash value.

The above measure of value as fixed by the Tennessee statute is precisely in accord with the authorities.

In *Rowley* v. *Chicago & N. W. Ry.*, 293 U. S., 109, this Court said:

> "The ascertainment of the value of a railway system is not a matter of arithmetical calculation and is not governed by any fixed and definite rule. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value—of the property. *Boom Co.* v. *Patterson*, 98 U. S., 403, 407 *et seq.*; *Cleveland, C., C. & St. L. Ry. Co.* v. *Backus*, 154 U. S., 439, 445. *Adams Express Co.* v. *Ohio*, 166 U. S., 185, 220. *Brooklyn City R. Co.* v. *New York*, 199 U. S., 48, 52. *Omaha* v. *Omaha Water Co.*, 218 U. S., 180, 202-203, Minnesota Rate Cases, 230 U. S., 352, 434, 454. *Branson* v. *Bush*, 251 U. S., 182, 185-188. *Southwestern Bell Tel. Co.* v. *Pub. Serv. Comm'n.*, 262 U. S., 276, 287. *United States* v. *New River Collieries*, 262 U. S., 341. *Brooks-Scanlon Corp.* v. *United States*, 265 U. S., 106, 123-126. *Standard Oil Co.* v. *Southern Pacific Co.*, 268 U. S., 146, 155 *et seq.* *McCardle* v. *Indianapolis Water Co.*, 272 U. S., 400, 410, 414. *Olson* v. *United States*, 292 U. S., 246, 255 *et seq.*"

In *Great Northern Railway Co.* v. *Okanogan Co.*, 223 Fed., 198, it is said:

> "The value of a completed railroad is not easy of ascertainment. Railroads are not usually bought and sold on

the open market. Their value is in use, rather than in exchange, and many elements go to make up that value. The cost of construction or reproducing, the income, the earning capacity, the value of stock and bonds, have all been taken into consideration by the courts. *None of these elements are controlling, however.*"

A like statement to the above is to be found in 26 R. C. L., p. 189.

For a most exhaustive discussion of the evidential factors for determining the true value of railroad property for taxing purposes, the cases of *Northern Pacific Ry. Co.* v. *Adams Co.* (D. C.), 1 Fed. Sup., 163, at pp. 172-173, *Heiner* v. *Crosby* (C. C. A.), 24 Fed. (2d), 191-193, *Pleasant* v. *Missouri, Kansas & Texas R. Co.* (C. C. A.), 66 Fed. (2d), 842, at p. 847, are typical and illustrative.

In *Illinois Central Ry.* v. *Greene*, 244 U. S., 555, 61 L. Ed., 1309-1316, this Court said:

"The first three points relate to valuation, the last two to apportionment. The district court properly held that the action of the Board must be sustained unless it was made to appear that they had adopted a fundamentally wrong principle, or had been guilty of fraud. It held further, that no fundamentally wrong principle was involved in determining whether such a railroad system should be valued on the capitalization-of-income, or on the stock-and-bond plan; or, if the former, *what rate of interest should be used in capitalizing*, or how many years' earnings should be considered, or what was in fact the amount of net income for a given year; or, if the stock-and-bond plan was adopted, what was the value of the stock and bonds; and that *on these and similar matters the action of the Board, in the absence of fraud, was binding upon the court.* In this we concur." (Italics ours.)

Illinois Central v. *Greene, supra.*

The above cited authorities all recognize and support the proposition of law that there are numerous factors to be taken into consideration by a board of equalization in determining the value of a railroad. The Tennessee statutes recognize the same rule and point out to the Railroad Commission and State Board of Equalization, to a limited extent, the factors to be considered by them. No statute, or decision of the courts either for that matter, adopts any one method of valuation to the exclusion of the others; nor is there any effort to dictate to the Railroad Commission or a board of equalization the precise weight to be accorded to one or more of the factors of valuation. Common sense and human experience preclude any adoption of a method so inflexible.

Before this Court, and on page 18 of the petition, counsel for petitioner is agreeing with the opinion of the Supreme Court of Tennessee that the statutes do not require that net income be made a predominant factor in arriving at the value of railroad property for assessment. This position, however, was not in accord with petitioner's position before the taxing officials and in the courts of Tennessee—the parts of the record hereinabove cited and also the opinion of the Supreme Court of Tennessee *definitely show that petitioner was then insisting upon a capitalization of net income at 6% as a predominant or only reasonable method of fixing the value of its property.*

We would remark in conclusion that, taking into consideration the vast amount of wholly unproductive property in the country upon which taxes are paid and the fact that the rate of interest return upon national and State obligations, as well as all other investments, is notoriously lower than in previous years,—the Railway's insistence upon a valuation based upon capitalization of net income at 6% was unreasonable.

II.

ALLOCATION OF SYSTEM VALUE TO TENNESSEE UPON A MILEAGE BASIS HAS BEEN GENERALLY APPROVED AS A FAIR AND JUST METHOD.

It is complained by petitioner that the apportionment of distributable property in Tennessee on a mileage basis is invalid. The Railroad Commission found the Railway's distributable property in Tennessee to be the average value per mile of the system's distributable property multiplied by the number of miles of main track in Tennessee. On the basis of the total mileage in the system of 1115.34, of which 800.02 miles is in Tennessee, the total or entire value of distributable property was found to be $18,022,133.14. The Commission assigned to Tennessee for taxation a value of $12,926,944. It is contended by petitioner that this method of allocation, even though provided and required by Code Sec. 1526 (Appendix, p. 46), has the effect of importing into Tennessee for taxation values located in other states, contrary to the "due process of law" clause of the Fourteenth Amendment to the Constitution of the United States.

(R., pp. 15-17.)

It is further contended that the value of the entire property ($23,996,604.14) "is in substantial excess of any reasonable opinion or estimate of value supported by or deducible from any evidence upon which such assessment was made, and which finding of value is not supported by or based upon any evidence in the record upon which the assessment was made, all of the evidence showing that the actual value is not in excess of $16,021,298."

(R., pp. 10-11.)

The above statement is simply a renewal of the contention that the value of the property should have been fixed on the basis of capitalization of net income of the system at 6% and not upon the statutory basis adopted by the Railroad Commission.

Petitioner states on page 21 of the petition that the Supreme Court of the State cited only the early cases of *Pittsburgh, C., C. & St. L.* v. *Backus*, 154 U. S., 421, and *Cleveland, C., C. & St. L. R. Co.* v. *Backus*, 154 U. S., 439, as sustaining "the well-established rule of assessment on a mileage basis."

The Supreme Court of Tennessee held that the record in the instant case did not disclose that the portions of the railroad outside of Tennessee were of greater value than the portion within the State, or that any special circumstances existed to show a greater value outside the State than within the State.

(R., p. 130, Appendix, p. 79.)

Respondents submit to the Court that in valuing an interstate railroad the mileage basis of apportionment of value has been adopted by the courts almost to the exclusion of any other method. General statements of this rule are:

> "Valuation as a whole and apportionment according to mileage is an approved method and is constitutional. . . ."
>
> Cooley on Tax'n., Vol. 2, pp. 1934-1935.

> "If a railroad extends into two or more states its value as a whole may be determined and the assessment made in proportion to the mileage within the state, unless there is good reason for rejecting the unit system."
>
> Cooley on Tax'n., Vol. 2, Sec. 815, pp. 1660-1663.

> "The doctrine of the court of last resort is that taxing officers may make a valuation upon a mileage basis, al-

though the property assessed is used as an instrumentality of commerce between the states."

Elliott on Railroads, Vol. 2 (3d Ed.), p. 314.

"Valuation of an interstate railroad as a whole and apportionment according to mileage is an approved method and is constitutional."

Fletcher on Corporations, Vol. 14, pp. 899-901.

Among the numerous cases in which this Court has approved the mileage basis of apportionment are: *Pullman Co.* v. *Pa.*, 141 U. S., pp. 18-19; *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S., 217-236; *Branson* v. *Bush*, 251 U. S., 182, 64 L. Ed., 215; *Taylor* v. *Secor*, 92 U. S., 575; *Union Pacific Ry. Co.* v. *Ryan*, 113 U. S., 516-527.

Respondents submit that the decisions of this Court, the decisions of the inferior Federal courts, and the decisions of the State courts are so numerous that a mere citing of same would unnecessarily encumber our brief. Consequently, we cite hereinafter only a few of the authorities collected.

In *Pittsburgh, C., C. & St. L. R. Co.* v. *Backus*, 154 U. S., 421, 38 L. Ed., 1031, the Supreme Court of the United States said:

"Nevertheless, it is ordinarily true that when a railroad consists of a single continuous line the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this court several times as eminently fair. Thus, in *State R. Tax Cases*, 92 U. S., 608 (23:671) it was said:

"'It may well be doubted whether any better mode of determining the value of the portion of the track within any one county has been devised than to ascertain the

value of the whole road; and apportion the value within the county by its relative length to the whole.'

"And again, on page 611 (672) :

" 'This court has expressly held in two cases, where the road of a corporation ran through different states, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each state, as the basis of taxation.' *Minor* v. *Philadelphia, W. & B. R. Co.* ('Delaware R. Tax'), 85 U. S., 18 Wall., 206 (21:888); *Erie R. Co.* v. *Pennsylvania*, 88 U. S., 21 Wall., 492 (22:595)."

"The mileage basis of apportionment was also sustained in *Western U. Teleg. Co.* v. *Atty. Gen.*, 125 U. S., 530 (31: 790); *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S., 18 (35:613); 3 Inters. Com. Rep., 595; *Maine* v. *Grand Trunk R. Co.*, 142 U. S., 217 (35:994), 3 Inters. Com. Rep., 807; *Charlotte C. & A. R. Co.* v. *Gibbes*, 142 U. S., 386 (35:1051); *Columbus Southern R. Co.* v. *Wright, ante*, p. 238."

In *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S., 194, 41 L. Ed., 683, the Supreme Court of the United States said:

"And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular state is, in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole. *Pittsburgh, C., C. & St. L. R. Co.* v. *Backus*, 154 U. S., 429 (38:1037)."

In *Atchison, T. & S. F. Ry. Co.* v. *Sullivan*, 173 Fed., 456 (Circuit Court of Appeals), the Court said, with reference to the mileage basis of apportionment:

"This method of assessment has been repeatedly sustained by the Supreme Court. *Pittsburgh, C., C. & St.*

L. R. R. Co. v. *Backus*, 154 U. S., 421, 428, 429; 430, 14 Sup. Ct., 1114, 38 L. Ed., 1031; *Adams Exp. Co.* v. *Ohio State Auditor*, 166 U. S., 185, 220, 221, 222, 224, 17 Sup. Ct., 604, 41 L. Ed., 965; *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S., 194, 197, 221, 17 Sup. Ct., 305, 41 L. Ed., 683."

To the same effect are *Ames* v. *People* (Sup. Ct. of Colo.), 56 Pac., 663-664; *Northern Pac. Ry. Co.* v. *State* (Sup. Ct. of Wash.), 147 Pac., 52; *State, ex rel., Morton* v. *Black* (Sup. Ct. of Neb.), 100 N. W., 952; *People, ex rel., City of Chicago* v. *State Board of Equalization* (Sup. Ct. of Ill.), 68 N. E., 943; *Gulf R. R. Co.* v. *Morris*, 7 Kan. Rep., 210; *Vanceburg & S. L. Tnpk. Co. R.* v. *Maysville & B. S. R. Co.* (Ct. of App. of Ky.), 63 S. W., 749; *Atl. Coast Line R. Co.* v. *Amos* (Sup. Ct. of Fla.), 115 So., 315.

It is to be conceded that in rare instances the courts have recognized exceptions to the general rule as above announced sanctioning the mileage basis of assessing interstate railroads. Those few cases are where the appurtenances of the road in foreign states give an altogether disproportionate value to that portion of the road which lies without the state. There must be special circumstances existing which distinguish between the conditions in the several states, such as terminal facilities of great value in one state and not in the other states, etc.

Counsel for respondents insist that the apportionment of distributable property to Tennessee on a mileage basis is eminently fair and just for the reason that this particular Railway very definitely falls within the general rule as above stated rather than under any exception thereto.

What exceptional circumstances require that this Railway should be valued otherwise than under the general rule? Approximately 70% of its mileage is located in Tennessee and of

the four large Southern cities which it serves, Memphis, Nashville, Chattanooga and Atlanta, three of these are located in Tennessee. There could hardly be any argument based upon the cost of construction, as we would venture the assertion that nearly all of the expensive mountainous construction is located in Tennessee. Giving full consideration to the figures which petitioner submitted to the assessing bodies and the courts of Tennessee, the respondents maintain that the showing is inadequate upon which to ignore the general rule of mileage basis apportionment.

III.

A. EQUALIZATION IN ASSESSMENT WAS NOT DENIED PETITIONER.

The remaining ground contained in the petition for *certiorari* alleges that petitioner was denied equalization. Petitioner's contention is briefly and correctly stated by the Supreme Court of Tennessee in its opinion as follows: (R., p. 130, Appendix, p. 80.)

> "Another complaint made by the Railway is that the Commission and Board assessed its property at actual value, while the property of all other taxpayers was assessed at two-thirds of its actual value. A large number of affidavits made by local assessors were filed with the Commission to the general effect that affiants intentionally and systematically assessed other property for taxation at an amount not exceeding seventy-five per cent of its actual value. Affidavits from others to like effect were also filed."

In response to the above contention of petitioner, the Supreme Court of Tennessee held as follows: (R., pp. 131-132.)

> "The assessments as made by the county assessors are not final. On the contrary, the assessment lists are re-

quired to be delivered by the county court clerk to the county board of equalizers (Code 1424). Under Code 1426, the duties and powers of the board are defined. It is made their duty 'to carefully examine, compare, and equalize the county assessments.' It is further provided therein that, 'said board shall have the power, and it is hereby made its duty, to increase or lower the entire assessment roll or any assessment contained therein, so as to equalize the assessment of all property contained therein, *and make such assesment conform to the actual cash value of the property described in the assessment.* If the property described in said assessment lists or any part thereof *shall have been assessed at less than the actual cash value thereof, the value of the same shall be increased so as to conform to the actual cash value thereof,* . . .' (Italics ours.) (By the Court.)

"Under Code, 1434, the county board upon returning the assessment roll to the clerk are required to append to the same a verification, signed by each member, that they have equalized and fixed the value of all property at the actual cash value thereof.

"Under Code 1440, it is made unlawful for board to equalize at less than actual cash value. It is made the duty of the county board of equalizers to transmit to the State Board of Equalization a summary of the assessment as completed by it.

"The State Board of Equalization is directed to meet at places throughout the State, selected by them. (Code 1448.) And it is provided in Section 1456 that the Board '*shall have jurisdiction of, and it shall be its duty, to equalize during its session the assessments of all properties in the State' and its action 'shall be final and conclusive as to all matters passed upon, . . . subject to judicial review.*' (Italics ours.) (sic.)

"If the county assessors and the few members of county boards of equalizers making affidavits on the hearing before the Commission assessed property at less than ac-

tual value, and did so intentionally and systematically, there is no showing whatever that the members of the State Board of Equalization violated their oath of office by underassessing property. In the absence of a contrary showing, it must be assumed that the State Board did their duty. There is neither allegation nor proof that the State Board intentionally and systematically refused to equalize assessments at actual value. The good faith of such officers and the validity of their actions are presumed. *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S., 350, 62 L. Ed., 1154. In order to support a claim of discrimination under the equal protection clause of the Fourteenth Amendment there must be something that amounts to an intention or the equivalent of fraudulent purpose to disregard the fundamental principle of uniformity.".

(R., pp. 131-132.)

Respondents respectfully insist that the record does not show that the various county tax assessors and county equalization board members *intentionally and systematically* undervalue property assessed by them. There may have been isolated instances of undervaluation, but there is no evidence that such undervaluation was the result of any intentional and systematic scheme of underassessment.

If, however, it be assumed for argument that the affidavits of the county tax assessors and county equalization board members of less than one-third of the State's ninety-five counties offered by petitioner are sufficient to establish a practice of systematic and intentional undervaluation on the part of the affiants, still the petitioner fails to make out a case under the Fourteenth Amendment for the reasons stated in that part of the opinion of the Supreme Court of Tennessee as immediately quoted above. That Court carefully pointed out that under the applicable Tennessee statutes the action of the county tax assessors and county equalization board members,

with reference to the assessment of property throughout the State, is not final, but that the *State Board of Equalization is the final arbiter on the questions of valuation and is charged with the duty of equalizing assessments on all properties in the State.*

The Supreme Court of Tennessee properly held that since there was no showing by the Railway that the State Board of Equalization failed to do its statutory duty, it would be assumed that the Board performed its duty and raised the valuation of the properties referred to in the affidavits offered by the petitioner.

The petitioner, at page 8 of its petition for *certiorari*, says that:

> "The Supreme Court of Tennessee declined to sustain the petitioner's claim to equalization, indulging a technical presumption that the State Board of Equalization had not participated in the underassessment of other property."

Respondents deny that the State Supreme Court, in ruling against the Railway, was merely "indulging a technical presumption." On the contrary, the conclusion reached by the Court, and which was attempted to be overturned by the Railway, was necessitated and dictated by a substantial and reasonable rule of universal application, i. e., in the absence of proof to the contrary, there is a presumption that every sworn officer does his duty.

By Section 1472 of the Code of Tennessee (Appendix, p. 41) the members of the State Board of Equalization, before entering upon the discharge of their duties, are required to "*take and subscribe to an oath* that they will fairly and impartially perform the duties imposed upon them by this article, and equalize, fix and compute the values of all properties

within their jurisdiction, so that the value thereof shall conform to the standard of the actual cash value of the same."

By Section 1451 of the Code of Tennessee (Appendix, p. 39) it is provided that the State Board of Equalization "shall equalize, compute and fix the value of all such properties within its jurisdiction by a standard or the actual cash value of same and for said purposes said board shall have the power *and it is made its duty to reduce or increase values of properties so that the value of all assessments when so equalized shall conform to the standard of actual cash value.*"

By Section 1456 of the Code of Tennessee (Appendix, p. 40) it is provided that the State Board of Equalization "shall have jurisdiction of *and it shall be its duty to equalize during its session the assessments of all properties in the State,* including any appeals which may be filed by merchants from the action of the superintendent of taxation."

There is neither allegation nor proof by the petitioner that the Board of Equalization failed to perform its statutory duties. In this situation we submit that the State Supreme Court properly gave effect to the rule which has many times been applied by it and other courts everywhere; that is, in the absence of a showing to the contrary, it will be presumed that a sworn officer does his duty.

In *Dunlap* v. *Sawvel*, 142 Tenn., 696, at page 707, the Supreme Court of Tennessee said:

> "It is a well-established law in Tennessee that every sworn officer does his duty, and in the absence of proof to the contrary this presumption will prevail. *Rogers* v. *Jennings*, 3 Yerg., 308; *Loyd* v. *Anglin*, 7 Yerg., 428, 431; *Mitchell* v. *Lipe*, 8 Yerg., 179, 181, 20 Am. Dec., 116; *Frierson* v. *Galbraith*, 12 Lea, 129; *State* v. *Myers*, 85 Tenn., 203, 207, 5 S. W., 377."

In *National Plastic Relief Co.* v. *Signal Amusement Co.*, 151 Tenn., 235, at page 237, the Court said that "the *presumption* is that the Secretary of State has done his duty in the premises. . . ." In *Lummus Cotton Gin Co.* v. *Arnold*, 151 Tenn., 540, at page 558, the Court said that "the *presumption* is that every sworn officer does his duty. . . ." In *Fort* v. *Dixie Oil Co.*, 170 Tenn., 464, at page 467, the Court said that "the *presumption* is that the Commissioner of Finance has done his duty in making his investigation and his findings. . . ." In *Treadwell Realty Co.* v. *City of Memphis*, 173 Tenn., 168, at page 175, there is a reference to "a sworn statement by the assessor, required by statute (Code, Sec. 1375), which it will be *presumed* conformed to the statute and was in the records before the Board."

In the case of *Hayes* v. *United States*, 170 U. S., 637, 42 L. Ed., 1174, one of the questions was whether or not a colonization law of 1824 had been promulgated in the territory of New Mexico at the time a certain grant was made. There was no proof in the record on this question. This Court said:

> "The Constitution of Mexico in article 16, paragraph 13, made it the duty 'of the supreme executive power to cause to be published, circulated, and observed, the laws and the general Constitution.' 1 White, New Recop., 398. In the absence of proof *the presumption of omnia rita* creates the inference that the duty was performed."

In *King* v. *Mullins*, 171 U. S., 404, 43 L. Ed., 214, there was involved the validity of certain provisions of state laws with reference to the forfeiture of lands for nonpayment of taxes thereon. In its opinion in that case this Court said:

> "It is said that the landowner will be without remedy if the commissioner of the school fund should fail to institute the proceeding in which the statute permitted such owner to intervene by petition and obtain a redemption

of his lands under forfeiture claimed by the state. *It cannot be assumed that the commissioner will neglect to discharge a duty expressly imposed upon him by law. . . .*"

In the instant case the petitioner apparently concedes the force of the rule for which we are contending and endeavors to escape its application by an insistence that the power of the State Board of Equalization to raise the valuation of underassessed property extends only to cases where complaints are filed by a taxpayer under Section 1450 of the Code of Tennessee. (Appendix, p. 39.) It is said by the petitioner that there is no proof in the record as to whether or not any such complaints were filed under this Code section and that to presume that such complaints were filed and that the State Board raised the valuation of underassessed property as the result of such complaints would be to "pile presumption upon presumption."

This argument of course assumes that the Tennessee statutes, properly construed, limit the power of the State Board of Equalization to raise the valuation of underassessed property only in cases where complaints are filed under Code Section 1450. It is respondents' insistence that the Board's power cannot be held to be so limited. In fact, the Supreme Court of Tennessee, in construing these Tennessee statutes in the instant case and in the part of the opinion hereinabove quoted, expressly recognizes the duty and power of the Board of Equalization to raise or lower all assessments on property throughout the State.

There are numerous provisions in the applicable statutes which negative petitioner's idea that the State Board's revisory power over assessments extends only to cases where complaints are filed, and which strongly support our view that

the State Board's power is not so limited, but extends to *all assessments on all property* in the State.

Section 1456 of the Code of Tennessee (Appendix, p. 40) provides in part that the State Board of Equalization "shall have jurisdiction of and it shall be its duty to equalize during its session the assessments of *all properties in the* State."

Code Section 1463 (Appendix, p. 40) provides that "the superintendent of taxation shall give his entire time to the work of gathering evidence and compiling same and making reports to the Board" of Equalization.

Section 1467 of the Code (Appendix, p. 41) provides that the State Board of Equalization "shall have the power to require the superintendent of taxation and any other agent or assistant employed to submit such facts and reports as may be deemed necessary to enable said board to *equalize assessments on property of the various classes and in the different localities of the State.*"

Section 1478 of the Code (Appendix, p. 41) provides that it shall be the duty of the superintendent of taxation "to obtain evidence, information and statistics relative to the value of the property to be assessed and equalized," and "*to procure the assessment of all property in the State* at the actual cash value thereof."

Section 1462 of the Code (Appendix, p. 40) provides as follows:

> "It is declared to be the legislative intent that this law be *liberally construed* in favor of the jurisdiction and powers conferred upon the superintendent of taxation; and upon the state board of equalization. The superintendent and/or board shall have and exercise all such incidental powers as may be necessary to carry out and effectuate the objects and purposes of this law, *to equalize the assessment of all properties subject to taxation.*"

In the face of this sweeping declaration of legislative intent, respondents are unable to see how it can be argued that the State Board of Equalization does not have power to raise or lower assessments on all property in this State, irrespective of whether complaints are filed or not. The statute relating to the filing of complaints is merely a remedy granted to the taxpayer—it cannot be construed as circumscribing the statutory authority conferred upon the Board of Equalization to equalize the assessment of all properties in the State.

In 61 Corpus Juris, p. 744, it is said that "the action of a board of equalization is automatic in the sense that no complaint, demand, or petition is necessary to set it in motion."

Respondents therefore submit that since it was the power and duty of the State Board of Equalization to equalize the assessment on all properties throughout the State, and since there is neither *proof nor allegation* by the petitioner that the State Board did not perform its duty in this regard, the Supreme Court of Tennessee correctly held that it must be presumed that the Board performed its statutory duty and raised the valuation on all property, which in their judgment was underassessed to the level of its actual value.

B. THE EVIDENCE IS INSUFFICIENT TO SHOW A DENIAL OF EQUALIZATION.

In order to support a claim of discrimination under the equal protection clause, there must be something that amounts to an intention or the equivalent of fraudulent purpose to disregard the fundamental principle of uniformity.

In *Rowley* v. *Chicago & N. W. Ry.* (1934), 293 U. S., 111, this Court stated:

> "There is nothing in this record to suggest any lack of good faith on the part of the board. Overvaluation re-

sulting from errors of judgment will not support a claim of discrimination. There must be something that amounts to an intention, or the equivalent of fraudulent purpose, to disregard the fundamental principle of uniformity. *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S., 350. *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S., 441. *Chicago G. W. Ry. Co.* v. *Kendall*, 266 U. S., 94. *Iowa-Des Moines Bank* v. *Bennett*, 284 U. S., 239, 245. *Cumberland Coal Co.* v. *Board*, 284 U. S., 23, 28."

The New Jersey Railroad cases, in which a petition for *certiorari* was denied by this Court within the past year, are: *Central R. Co. of N. J.* v. *State Tax Department, et al.* (Court of Errors and Appeals of N. J.), 169 Atl., 489; *Certiorari* Denied, 293 U. S., 568, 79 L. Ed., 667; *Lehigh R. R. Co.* v. *Thayer Martin, et al.*, 100 Fed. (2d), 139; *Certiorari* Denied, 306 U. S., 651, 83 L. Ed., 1049-1050; Petition to Rehear denied April 17, 1939, 306 U. S., 669, 670, 83 L. Ed., 1063-1064.

An examination of those cases reveals that the railroads of New Jersey presented substantially the same type of evidence as was presented in the instant case in an effort to show a denial of equalization. In fact, a much stronger case in this regard was presented in the "New Jersey Railroad Cases" than has been presented in the case at bar. The petitioners there relied upon the same authorities as are relied upon in the case at bar.

In *Central R. Co. of N. J.* v. *State Tax Department*, 169 Atl., 493, the Court of Errors and Appeals of New Jersey said, in reference to the type of evience presented:

"It is vague, indefinite, and unreliable. It opens wide the doors of fraud which might be practiced under its cover. The intrinsic value of such evidence is simply not present. This testimony, together with the other offered exhibits, falls far short of being definite, positive, or re-

liable. It is subject to many of the criticisms stated in relation to the evidence already commented upon. Hearsay evidence, incompetent exhibits, and reports are characteristic. The sum total of all the evidence offered does not justify the contention of the appellant that property throughout the state was systematically or intentionally undervalued or that it lacked equality and uniformity or that the local assessors in making valuation did not act in good faith.

"Appellant undertook to prove an organized and determined effort to undervalue property other than railroad property, systematically or intentionally. It must establish this undertaking as an adopted practice. *Chicago G. W. R. Co.* v. *Kendall*, 266 U. S., 94, 45 S. Ct., 55, 69 L. Ed., 183; *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S., 441, 43 S. Ct., 190, 67 L. Ed., 340, 28 A. L. R., 979; *Southern R. Co.* v. *Watts*, 260 U. S., 519, 43 S. Ct., 192, 67 L. Ed., 375.

"'. . . Mere errors of judgment by officials will not support a claim of discrimination. There must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity. The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party.' *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U. S., 350, 38 S. Ct., 495, 62 L. Ed., 1154.

"The mere fact that there may be differences in the judgment of men respecting proper values is not decisive. Such differences do not evince discriminations prejudicial to appellant.

"A careful study of the many cases on the subject of the equality and uniformity of taxation leads to the observation so lucidly and effectively expressed by Justice Miller, speaking for the United States Supreme Court in the State Railroad Tax Cases, 92 U. S., 575, 612, 23 L. Ed., 663, wherein he held:

"'. . . Perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best: But the most complete system which can be devised, must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect.'"

Central R. Co. of N. J. v. *State Tax. Dept., supra.*

In the instant case the State Board of Equalization had the following to say relative to the affidavits offered by petitioner relative to underassessment:

"This information is very interesting, but we are not familiar with the methods used by him (Mr. Pouder) in reaching his figures on actual cash value, nor do we know how the percentage of cash value was reached for assessable purpose. Many other affidavits are in the record purporting to establish that theory, but we think they are subject to the same objection as that of Mr. Pouder."

R., p. 102, Appendix, p. 59.

Upon the merits of the case, and referring to the large reductions of assessment enjoyed by petitioner over a period of years, the State Board of Equalization further said:

"We are convinced that this reduction of the Company's assessment from the high point in recent years is comparable with the reduction enjoyed by owners *of other property or any class of property within the bounds of this State.*

R., p. 101, Appendix, p. 58.

The Circuit Judge in his opinion, in referring to the affidavits offered by petitioner of underassessment of other property, stated:

"I do not find in any affidavit anything to indicate just how these affiants determined the question of 'cash value'

or that, in any instance they applied a proper rule of law in arriving at the 'cash value' of property.

" 'Every affidavit on file as to valuation represents the opinion of affiants. It may be the opinion of an expert or non-expert. The defendant Boards must have considered and weighed the value to be given these opinions. I have no right to assume they were arbitrarily disregarded. Is it the duty of this Court to say what value should be given to these opinions, and that the defendant Boards did not attach the proper value to such testimony? I think not."

R., p. 84, Appendix, p. 65.

Further, upon the merits of the case, the Supreme Court of Tennessee said:

"From our examination of the record, we are satisfied that the assessment made on the property of the Railway was *fair and equitable.* There is nothing to support the contention that the assessment was discriminatory or arbitrary."

R., p. 132, Appendix, p. 83.

Further, upon the merits of the case, and in reference to petitioner's contention that other property generally throughout the State was assessed for taxation at less than its present cash value, the Supreme Court of Tennessee expressly found:

"Whatever may have been the practice in this regard in former times, it is our belief that since 1930 assessments *generally* are and have been higher than the actual cash value of the property assessed."

R., p. 133.

The respondents make the point that the affidavits presented by petitioner fail to show by what mode of reasoning the affiants reach their estimates of value, or percentages of value. There being a wide divergence of opinion upon the "value" of the innumerable pieces and types of property within the State, the petitioners could undoubtedly solicit many

affidavits holding in accord with their contention. Such affidavits, however, are not sufficiently definite for the Court to ignore and set aside the official oaths of every official from the county tax assessors to the State Board of Equalizers as being false. *Neither the assessing bodies nor the courts of Tennessee anywhere express any doubt but that the assessment of petitioner's property was fair, just and equalized with all other property within the State.*

The character of the evidence offered could not justify a possible finding that there existed an organized and determined effort on the part of local assessors to assess systematically or intentionally local property at less than its true value. As said by this Court in *Sunday Lake Iron Co. v. Wakefield*, 247 U. S., 350, 62 L. Ed., 1154:

> "It is clear that mere errors of judgment of officials will not support a claim of discrimination. There must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity. Good faith of such officers and validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party."

In *Southern Ry. Co. v. Watts*, 260 U. S., 519, which was a suit to enjoin the collection of taxes by the State of North Carolina from certain railroad companies, the Railway relied upon the equal protection clause of the Federal Constitution. This Court said:

> "The claim that plaintiffs have been denied equal protection of the laws appears to rest more largely on the charge that discrimination has been practiced against them in administering the tax laws. It is urged that county boards, proceeding under Sec. 28a of the Act of 1921, reduced real estate valuations quite generally, but that the state board acting under Sec. 28g, refused to reduce the valuation of any railroad except that of the

> Norfolk & Southern. The rule is well settled that a taxpayer, although assessed on not more than full value, may be unlawfully discriminated against by undervaluation of property of the same class belonging to others. *Raymond* v. *Chicago Union Traction Co.*, 207 U. S., 20. This may be true although the discrimination is practiced through the action of different officials. *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S., 499. But, unless it is shown that the undervaluation was intentional and systematic, unequal assessment will not be held to violate the equality clause. *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S., 350, 353; *Chicago, Burlington & Quincy Ry. Co.* v. *Babcock*, 204 U. S., 585; *Coulter* v. *Louisville & Nashville R. R. Co.*, 196 U. S., 599; *Sioux City Bridge Co.* v. *Dakota County, ante.*, 441. Plaintiffs have clearly failed to establish that there was intentional and systematic undervaluation by the county boards."

In accord with the foregoing authorities are *Chicago Great Western R. Co.* v. *Kendall*, 266 U. S., 94, 69 L. Ed., 183; *Rowley* v. *Chicago & N. W. R. Co.*, 293 U. S., 102, 89 L. Ed., 223; *St. Louis-San Francisco R. Co.* v. *Middlekamp*, 256 U. S., 226, 65 L. Ed., 905; *Ohio Oil Co.* v. *Conway*, 281 U. S., 146, 74 L. Ed., 775.

Respondents respectfully point out to the Court that just as in the "New Jersey Railroad Cases," *supra*, the petitioner here has endeavored to fashion its proof to comply with the character of evidence that seems to appear in the class of cases of which *Louisville & Nashville R. Co.* v. *Greene, et al.*, 244 U. S., 522, 37 S. Ct., 683, 61 L. Ed., 1291, is typical. The evidence in the instant case, however, is not sufficiently definite, positive or certain in quantity or quality to overcome the presumption of the correctness of the assessment. The petitioner, having already secured approximately ten million dollars reduction of assessment in the past ten years, finds

itself in litigation wholly without merit and has found itself rebuffed by both the taxing authorities and the courts of Tennessee.

Respondents earnestly insist that the State of Tennessee has already dealt most generously with this petitioner when this assessment is compared with the assessment of all other property in the State, including other railroads and public utilities.

The petition for *certiorari* is wholly without merit, either from the standpoint of fact or law.

Respectfully submitted,

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APPENDIX.

CODE OF TENNESSEE—SECTIONS CITED.

SECTION 1375.

1375. *Assessor's oath to assessment list.*—Each assessor, when he makes his report of his assessment list to the county court clerk provided in the preceding section, shall accompany the same with the following oath, to be made and subscribed to before the judge or chairman of the county court and filed in the office of the clerk of the county court, viz.:

"I, ..., assessor of the county of ....., State of Tennessee, do solemnly swear (or affirm) that I have set out in the foregoing assessment list all taxable property, real and personal, and all the privileges and polls in said county of ..... as far as ascertainable to the true owners thereof, and that I have required lists to be filled and filed and sworn to by all property holders or their agents or attorneys, and reported such as have not done so to the district attorney, and reported lists of all parties liable for polls, and that I have estimated the value of all property, real and personal or mixed, at its actual cash value as prescribed by law, to the best of my knowledge and ability, without fear, favor, or affection; and that I have faithfully discharged my duties and kept my oath of office as assessor, according to law to the best of my knowledge and ability, so help me God."

"Sworn to and subscribed before me this ..... day of ....." (1907, ch. 602, sec. 10.)

SECTION 1424.

1424. *Assessment lists to be delivered to board by county court clerk.*—The county court clerk shall, at the first day's session of the board, deliver the county assessment lists or rolls to said board for its consideration. (Ib.; 1921, ch. 135.)

SECTION 1434.

1434. *Board's certificate to assessment rolls upon returning same to county court clerk.*—Upon returning the assessment rolls of the

county to the county court clerk, the said board of equalizers shall append to or endorse upon the same a certificate signed by each member, viz.:

"We, the undersigned members of the board of equalizers of the county of ....., do hereby officially certify that we have equalized, computed, and fixed the values of all properties set out in the assessment rolls of said county, upon the standard of the actual cash value of the same, by raising the values of all properties assessed at less than the actual cash value thereof to the actual cash value of the same, or by reducing the values of all properties assessed at a greater than the actual cash value thereof to the actual cash value of the same, and otherwise faithfully and honestly obeyed the requirements of the assessment laws of the state and kept our oaths of office.

"Witness our hands this ..... day of ....." (Ib.; 1921, ch. 135.)

Section 1440.

1440. *Unlawful for board to equalize assessments at less than actual cash value.*—It is declared unlawful for any county board of equalization, or any member thereof, willfully, knowingly, or negligently to compute, fix, or equalize, or willfully, knowingly, or negligently to permit or suffer the same to be done, the value of any property at less than its actual cash value. (Ib.)

Section 1448.

1448. *Meetings; quorum; statute and publication only notice of times and places.*—The state board of equalization shall meet at the office of the commissioner of finance and taxation, annually on the second Monday in August. The commissioner of finance shall act as secretary to the state board. The governor shall act as chairman of said board and the said commissioner of finance shall make an annual report to said board, laying all facts and data assembled by the commissioner before said board for its consideration and action. Five members of said board shall constitute a quorum for the transaction of business. It shall be the duty of the state board of equalization to sit for a portion of its allotted time in

the western division of the state and in the eastern division of the state in addition to its sessions at Nashville, the time and place of the sessions to be held at other points than Nashville to be designated by the state board, and publication of such time and place or times and places to be made through the press. In selecting points for its meetings at places other than Nashville, the state board shall select such places as will be most convenient to the taxpayers. Taxpayers and property owners without further notice than this stature, and due publication of the times and places of the meeting of the board as required herein are charged with notice of said session. Said sessions shall continue from time to time and day to day, until the equalization of all assessments is completed. (1921, ch. 113, sec. 7; 1923, ch. 7, sec. 25.)

SECTION 1450.

1450. *Taxpayers may complain of inadequacy and inequality of assessments, how and when.*—Any taxpayer, or any owner of property subject to taxation in the state, shall have the right to a hearing and determination of any complaint he may make on the ground that other property than his own has been assessed at less than the actual cash value thereof, or at a less percentage of value than his own property or other property or that his own property has been assessed at more than its actual cash value, but such complaint shall be specific, in writing, and sworn to and filed with said board at least ten days before the adjournment of the annual session. (1919, ch. 1, sec. 7; 1921, ch. 113, sec. 9.)

SECTION 1451.

1451. *Equalization to be made, how; false evidence perjury.*—Said board shall receive, and consider, all complaints and reports made to it, together with the evidence submitted therewith; and shall equalize, compute, and fix the value of all such properties within its jurisdiction by the standard of the actual cash value of same, and, for said purposes, said board shall have the power, and it is made its duty to reduce or increase, values and properties so that the values of all assessments when so equalized shall conform to said standard of actual cash value. Equalization of such properties may be made by said board, by reducing or increasing, the values thereof, by classification of property, or by wards, civil

districts or counties or in such manner as will enable the board to justly and equitably equalize assessments in conformity with said standard. A false statement of fact, either in an affidavit deposition made or taken under the provision of this law, to be filed with, and acted upon by said board or said commissioner, shall be perjury, and the one guilty punished therefor, as in other cases of perjury.' (Ib., sec. 10; 1919, ch. 1, sec. 8.)

SECTION 1456.

1456. *Board to equalize all property assessments, including appeals of merchants; action of board is final.*—Said state board shall have jurisdiction of, and it shall be its duty, to equalize during its session the assessments of all properties in the state, including any appeals which may be filed by merchants from the action of the superintendent of taxation. The action of the state board shall be final and conclusive as to all matters passed upon by said board, subject to judicial review; and such taxes shall be collected upon the valuation found and fixed by said board. (1921, ch. 113, sec. 14; 1919, ch. 1, sec. 10; 1923, ch. 7, sec. 25.)

SECTION 1462.

1462. *Liberal construction in favor of jurisdiction of superintendent and state board of equalization; incidental powers.*—It is declared to be the legislative intent that this law be liberally construed in favor of the jurisdiction and powers conferred upon the superintendent of taxation; and upon the state board of equalization. The superintendent and or board shall have and exercise all such incidental powers as may be necessary to carry out and effectuate the objects and purposes of this law, to equalize the assessment of all properties subject to taxation. (1921, ch. 113, sec. 20; 1919, ch. 1, sec. 16, Modified.)

SECTION 1463.

1463. *Superintendent of taxation full-time officer.*—Superintendent of taxation shall give his entire time to the work of gathering evidence and compiling same and making reports to the board. (1919, ch. 1, sec. 2.)

SECTION 1467.

1467. *Board may require reports to equalize assessments.*—The board shall have the power to require the superintendent of taxation and any other agent or assistant employed to submit such facts and reports as may be deemed necessary to enable said board to equalize assessments on property of the various classes and in the different localities of the state, and otherwise prescribe his duties and powers. (1919, ch. 1, sec. 4; 1923, ch. 7, secs. 2, 19, 24, 25.)

SECTION 1472.

1472. *No other compensation; oath to be taken and filed.*—It shall be the duty of the members to discharge the duties of said board without compensation, save such expenses, but before entering upon the discharge of such duties, they shall take and subscribe to an oath that they will fairly and impartially perform the duties imposed upon them by this article, and equalize, fix, and compute the values of all properties within their jurisdiction, so that the value thereof shall conform to the standard of the actual cash value of the same. Said oath shall be taken before some person authorized by law to administer an oath and be filed in the office of the secretary of state for preservation. (1907, ch. 602, sec. 37, subsec. 2.)

SECTION 1478.

1478. *Powers and duties of the superintendent.*—The superintendent shall have the following powers and shall perform the following duties in addition to such other powers and duties as may be conferred and imposed upon said superintendent by law. (1921, ch. 113, sec. 2.)

(1) *To have and exercise general supervision* over the administration of the assessment and tax laws of the state; to confer with and advise county tax assessors, county boards of equalization and other county officials in the performance of their duties in administering the assessments and tax laws of the state, to the end that all assessments of property be made relatively just and equal at the actual cash value of said property in substantial compliance with law.

(2) *Rules and regulations.*—The superintendent is vested with power to prescribe rules and regulations not inconsistent with law and prepare such forms as he may deem proper for the administration of the duties of his office and for the use and government of county tax assessors and county boards of equalization.

(3) *To obtain evidence, information, and statistics relative to the value of property* to be assessed and equalized; to regulate and prescribe the mode of taking evidence, whether by affidavit, deposition, or otherwise; to send for papers and witnesses; to compel the attendance of witnesses and to administer oaths and to perform such other acts as may be necessary, to carry out the provisions of law; to have and exercise all the powers of commissioners or clerks of courts in taking depositions, and to issue subpoenas for witnesses and to place same in the hands of any executive officer in any county in the state whose duty it shall be forthwith to execute same and make due returns thereof.

(3a) *Compensation for serving process, etc.*—Witnesses and sheriffs or constables executing process issued by the superintendent or the state board of equalization, shall receive the same compensation as is fixed by law for like services for a court of record.

(4) *Assessors to report; superintendent to furnish them forms and tax schedules.*—To require assessors to furnish reports when called for by the superintendent, giving specific information relating to assessments and other facts concerning properties and facts pertaining to the administration of the duties of the office of tax assessor. Said superintendent shall prepare and furnish to the various tax assessors all forms necessary for them to furnish the required information and shall also prepare and furnish to assessors tax schedules conforming to the different classifications of assessments.

(5) *Assessments at actual cash value.*—It shall be the duty of the superintendent to procure the assessment of all property in the state at the actual cash value thereof, and said superintendent is required to exercise all powers herein conferred upon him to that end.

(6) *Corporations, list of, showing what.*—The superintendent shall keep in his office a complete list of all the corporations in the

State of Tennessee, whose property is subject to assessment by county tax assessors; said record to show the name of each corporation, location, chief office or situs, authorized capital stock, outstanding capital stock, value of corporate property and such other facts as may be necessary to secure an actual cash value assessment of all property belonging to such corporations.

(7) *Corporation forms to be filled out; failure is a misdemeanor; fines.*—The superintendent shall prepare forms and blanks to be furnished each such corporation in the state, and it shall be the duty of said corporations to fill out such forms and file same with the superintendent under oath, and furnish all facts called for therein and such other facts as the superintendent may deem necessary. Any corporation failing or refusing to file said form or furnish said information called for by the superintendent, within thirty days after said forms are furnished said corporation or said request for said information is made, shall be guilty of a misdemeanor, and upon conviction be subject to a fine of not less than fifty dollars or more than two hundred and fifty dollars.

(8) *Superintendent to furnish county tax assessors abstracts of corporations; duty of commissioner of finance and taxation; review of his action.*—It shall be the duty of the superintendent to audit in his office all tax returns filed by said corporations, and to determine the proper assessment of each such corporation so far as possible. From the information thus obtained, it shall be the duty of the superintendent to furnish to the respective tax assessors of the respective counties of the state and to the chairman of the county boards of equalizaion, in an abstract or summarized form, the facts pertaining to each corporation as disclosed by the sworn return so made by said corporation. It shall be the duty of the chairman of the county boards of equalization to return said summary or abstract with a statement thereon, showing the amount assessed by said county board of equalization against such corporation within twenty days after the assessment is made by the county equalization board. It shall then be the duty of the commissioner of finance and taxation to compare the assessment so made by the county equalization board, as appears from said summary when so returned, with the return of the corporation made under oath, and if it appears that such assessment is less or more than it should

have been fixed by the county board of equalization, the commissioner of finance and taxation shall have the power to increase or decrease said assessment so as to conform to the amount disclosed by the said sworn return of such corporation, or to make such increase or decrease as in his judgment is deemed proper. But no increase shall be made until after notice has first been given to such corporation to appear either in person, or by brief filed, or by attorney, at the office of the commissioner of finance and taxation on or by a date fixed in said notice to show cause why such increase should not be made. It shall then be the duty of the commissioner of finance and taxation, where an increase or decrease has been m[illegible] to certify the action of the department to the trustee of the [illegible], and said assessment, when so certified, to become the legal [illegible]sment against such corporation and so entered on the records [illegible]e county trustee; provided, however, that the state board shall have the power to review, on appeal, the action of the commissioner of finance and taxation in making such increase or decrease. (Ib.; 1925, ch. 106.)

(9) *Report to state board of equalization as to assessment in the various counties.*—The superintendent shall make an annual report to the state board of equalization when it meets in its annual session and shall lay all facts assembled by the superintendent with respect to the assessments in the counties in the state before said state board for its consideration, and shall make such recommendations to the state board as he deems necessary to enable it to equalize the assessment of all classes of property.

(10) *Tax laws to be studied; report and recommendations to legislature.*—Said superintendent shall make a careful study and investigation of the tax laws of other states. It shall be his duty to prepare and transmit to the general assembly on the first day of its biennial session, a report of his work and the work of the state board of equalization, and shall make such recommendations as he may deem best for the interest of the state. (1921, ch. 113, sec. 2; 1925, ch. 106.)

SECTION 1508.

1508. *Assessment of said properties for state, county and municipal purposes.*—The railroad and public utilities commission, hereinafter called the commission, are authorized and directed to assess

for taxation, for state, county and municipal purposes, all of the properties of every description, tangible and intangible, within the state, belonging to the following named persons, hereinafter referred to as companies, namely: (1) railroads; (2) telephones; (3) telegraphs; (4) sleeping cars; (5) freight cars; (6) street cars; (7) power, whether hydroelectric, steam, or other kinds, for the transmission of power; (8) express; (9) pipe lines; (10) gas companies; (11) electric light companies; (12 motor bus and/or truck, and (13) water companies. The commission shall assess all of said property biennially in even years at its actual cash value as of the same date the properties of other persons are by law assessed; provided, this statute shall not apply to corporations organized under the laws of Tennessee whose principal business is the manufacture of products of the soil of Tennessee and who for the transportation alone of such products furnish their own cars. (1919, ch. 3, sec. 1; 1919, ch. 49, sec. 1; ch. 160, sec. 1; 1920, ex. scs., ch. 18, sec. 3.)

SECTION 1509.

1509. *Owners to file sworn schedules and statements of certain information.*—It shall be the duty of the owners of property mentioned in the preceding section, within the state, to file with the commission on or before the first day of April, biennially, in the even years, under oath, schedules and statements giving the following information; concerning all properties owned or leased by such owners: (1) the name of the company, its nature, whether a person, association, copartnership, corporation or syndicate, and under the laws of what state or country organized; (2) the location of its principal place of business, the post office address of the president, general manager, or executive officer or officers; (3) the name and post office address of the chief officer or managing agent of the company in Tennessee; (4) the gross receipts of its business as a whole and also of its business done within the state, and operating expenses for the preceding fiscal year; (5) the total capital stock, number of shares issued or outstanding, the par face value thereof, and in case no shares of stock are issued, in what manner its capital is divided, and its holdings evidenced; (6) the market value of said shares of stock or capital on the 10th day of January next preceding, or if said stock or capital have no market value, then the actual value; (7) the real estate, buildings, machinery, fixtures, appliances

and personal property owned by said company which is actually located within this State, the actual value thereof and the counties or municipalities in which the same are located; (8) real estate, together with the permanent improvements thereon, situated outside of the state and not directly used in the conduct of the business within the state, the purpose for which it is used, its value and the sum at which it is assessed for taxation in the locality where situated; (9) the bonded indebtedness and the market value thereof, if it has such, otherwise its actual value. (1919, ch. 3, sec. 2; 1919, ch. 160, sec. 2.)

SECTION 1526.

1526. *Assessment at actual cash value, ascertained from what.*—Upon examination of every such schedule and statement and all other evidence taken by them, the said commission shall proceed to ascertain and determine the value of said property within the state for taxation and assess the same accordingly, taking into consideration the capital stock, corporate property, franchises, and gross receipts, the market value of the shares of stock and bonded indebtedness, and such other evidence as is afforded by said statements and schedules or other evidence taken to enable them to fairly and equitably fix the actual cash value of the properties of such persons. (1919, ch. 3, sec. 4.)

SECTION 1533.

1533. *Assessments to be completed, when; exceptions, and hearing thereon; assessments to be filed with board of equalization, when.*—Said assessments shall be completed on or before the first Monday in August, and within ten days from the first Monday in August, the owner of any property assessed may appear and file exceptions to said assessment, together with such evidence as they may desire to submit as to the value of the property assessed, and at the expiration of said ten days, said commission shall reassemble and examine such additional evidence and exceptions as may have been filed, and act thereon, either changing or affirming their valuation. And on or before the first Monday in September, said commission shall file with the board of equalization the assessments made by them, together with such records as may be deemed necessary. (1919, ch. 3, sec. 9.)

SECTION 1534.

1534. *Valuation increased or diminished by board of equalization; additional evidence required; board may itself investigate and procure evidence; expense, how paid.*—The state board of equalizaiton shall proceed to examine said assessments so made by the commission, and they are authorized to increase or diminish the valuation placed upon any property valued by said commission, and are further authorized to require of said commission any additional evidence touching one or more of the properties assessed, and shall consider such additional evidence so furnished in fixing the correct value of any property so assessed, and said assessments shall not be deemed complete until corrected and approved by the said board of equalization; and the governor is authorized to call said commission at any time to perform the duties imposed upon them; provided, however, that if said board of equalization shall so desire, they shall have the power without referring any assessment to said commission, themselves to employ experts, accountants, and to call witness to testify upon any assessment certified to them by said railroad commission; and said board of equalization shall have the same powers to compel attendance of witnesses, production of books, papers, and docu entary evidence as is by this statute given to said commission. Said board of equalization shall have the right to call upon the interstate commerce commission for any valuations of property in the office of the interstate commerce commission and evidence in possession of said commission in support of such valuations.

All of the evidence thus acquired by said board of equalization shall be considered by them in addition to the evidence transmitted to said board by said commission in support of the assessment so fixed by said commission.

Any expense incurred by said board in calling for the additional proof as to the value of any property certified to them by said commission shall be by said board of equalization certified to the state comptroller and paid by him out of any moneys in the treasury not otherwise appropriated. (1919, ch. 3, sec. 10; 1920, ex. ses., ch. 18, sec. 1, 1923, ch. 7, secs. 19, 25.)

SECTION 1535.

1535. *Board to certify the valuations fixed which shall be final and conclusive.*—On or before the third Monday in October, said board of equalization shall certify to the commission the valuation fixed by it upon each property assessed under this law, and the action of the board of equalization in fixing the valuation upon such property shall be conclusive and final and the valuation so fixed shall be assessed against said property and the taxes due thereunder be paid. (1919, ch. 3, sec. 11; 1921, ch. 39.)

1. ASSESSMENT OF PETITIONER'S PROPERTY BY RAILROAD AND PUBLIC UTILITIES COMMISSION OF TENNESSEE.

From Record, pp. 33-38.

"THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY BEFORE THE RAILROAD AND PUBLIC UTILITIES COMMISSION OF THE STATE OF TENNESSEE, NASHVILLE.

IN RE:

Assessment of the property returned by the NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY for the purpose of taxation for the years 1938-1939.

HISTORY.

The Nashville, Chattanooga and St. Louis Railway Company was chartered under Chapter I of the Acts of the General Assembly of the State of Tennessee, 1845 and 1846, approved December 11, 1845. The organization of the company was perfected January 24, 1848, and by decree of the Chancery Court of Nashville, Tennessee, May 31, 1875, the name of the corporation was changed to 'The Nashville, Chattanooga and St. Louis Railway' which railway built, purchased or leased the different lines now being operated by it. In making this assessment due consideration will be given to each of the several railroads organized under separate charters and now forming a part of the Nashville, Chattanooga and St. Louis Railway.

	Main Line
Miles of road owned	748.63
Miles leased	366.72
Miles trackage rights	.16
Total	1,115.51

DISTRIBUTION OF MAIN LINE MILEAGE, OWNED OR LEASED BY STATES

State	Number of Miles	Per Cent
Tennessee	800.02	71.73
Alabama	113.30	10.15
Georgia	142.27	12.75
Kentucky	59.76	5.37
	1,115.35	100.00

The mileage of main line owned and leased in Tennessee by divisions and the total mileage of main line of said divisions is as follows:

	Mileage in Tennessee	Total Mileage of Division
Chattanooga Division	124.87	151.71
Northwestern Division	160.99	171.51
Western and Atlantic	15.45	136.85
Paducah and Memphis	180.63	229.87
Shelbyville Branch	8.44	8.44
McMinnville Branch	60.86	60.86
Columbia Branch	85.78	85.78
Huntsville Branch	2.58	80.48
Tracy City Branch	39.18	39.18
Sequatchie Valley Branch	54.78	57.68
Orme (Dorans Cove) Branch	2.03	10.42
Centreville Branch	60.78	60.78
West Nashville Branch	3.65	3.65
Rome Branch	.....	18.14
	800.02	1.115.35

SIDE TRACK MILEAGE

State	Miles	Per Cent
Tennessee	380.66	70.31
Alabama	45.30	8.37
Georgia	97.91	18.09
Kentucky	17.51	3.23
Total	541.38	100.00%

ROLLING STOCK

The Corporation reports the value of its rolling stock of $7,618,129, which amounts to $6,829.27 per mile of road operated. The Corporation reports that 69.27% of its rolling stock should be allocated to Tennessee.

The corporation operates 1,115.51 miles of main track of which .16 miles is trackage rights and 366.72 miles is leased, leaving only 748.63 miles owned by it and upon which its securities rest and in which its stockholders have an equity. 136.85 miles of track belongs to and is leased from the State of Georgia. It is not bonded and stockholders have no equity in the property other than the value of the leasehold. 229.87 miles of track belongs to and is leased from the Louisville and Nashville Railroad Company. It is mortgaged by bonds issued by the Louisville and Nashville Railroad, first by a first mortgage bond of $4,619,000 and then by a second mortgage of an indeterminate amount. Of the 800.02 miles of main track returned for taxation in Tennessee only 603.94 miles are owned by The Nashville, Chattanooga and St. Louis Railway.

BONDS

The bonded indebtedness resting upon the property returned by respondents for the purpose of taxation is:

Property owned	$16,800,000
Equipment	840,000
Paducah and Memphis Division	4,619,000
One-half of L. & N. Terminals, Nashville	1,250,000
	$23,509,000

The Western and Atlantic Division (136.85) belongs to the State of Georgia and is not bonded. Respondent leases the Western and Atlantic Railway (136.85 miles) from the State of Georgia at an annual rental of $540,000 and agrees to expend an average of $60,000 per annum in improvements and betterments, all such improvements and betterments to become the property of the State of Georgia, which arrangement is equivalent to an annual rental of $600,000. Based upon this rental charge the corporation has in the past valued this line at $10,000,000.

The Nashville, Chattanooga and St. Louis Railway also guarantees by endorsement or by agreement with other railroads the following bonds of other companies.

L. & N. Terminal Co. (Nashville)	$2,601,000
Memphis Union Station Co.	2,500,000
Paducah & Illinois R. R. Co.	2,587,000

STOCK

The capital stock of the Nashville, Chattanooga and St. Louis Railway is $25,600,000. No dividends paid since 1931.

The company gives the value of its stock based upon quotations for January 10, 1937, as $3,712,000.

The stockholders have no equity in the leased lines other than the value of the leaseholds. In the stock value is reflected the value of certain non-taxable securities and holdings which will be given due consideration.

EARNINGS

Year	Railway Operating Revenue	Net Railway Operating Income	Other Income	Net Income
1938 (3 mo.)	$ 3,322,810	$ 199,058	$ 55,201	D $133,415
1937	14,299,433	840,290	243,456	D 471,623
1936	14,145,656	1,382,842	227,453	51,999
1935	12,301,461	523,010	232,295	D 791,460
1934	12,733,702	953,544	243,693	D 351,939
1933	12,381,088	992,602	284,919	D 292,326

NON-OPERATING PROPERTY

The corporation owns property which it returns for taxation and which is not used in the service of railway operating income of the Corporation. The corporation returns for taxation property which it does not own, the value of which is not included in its bonds or its stock certificates or is in any way reflected in its net Railway Operating Income, is not used in the service of transportation and a large portion of which is business property located in the city of Chattanooga.

SECURITIES AND CHOSES IN ACTION ON HAND JANUARY 10, 1938

Situs in Tennessee	$2,585,286
Situs outside Tennessee	1,149,471

Included in those securities in Tennessee is an amount, of $1,058,724 representing U. S. Treasury Bonds.

FRANCHISE

The corporation was asked to give the value of its franchise and the method by which said value was arrived at, which it failed or refused to do, claiming that there was no known rule or method by which its value could be determined.

LOCALIZED PROPERTY

The corporation reports the value of its localized property as follows:

Outside Tennessee	Localized Property, Leased Rail, etc.
Alabama	$ 215,029
Georgia	2,360,522
Kentucky	101,670
	$2,677,221

We find the value of such localized property in Tennessee as returned by the corporation to be $3,297,250

CORPORATE PROPERTY

Final valuation as made by the Interstate Commerce Commission	$69,262,132
Additions and betterments since valuation date, January 30, 1916	11,840,601
Equipment	7,618,129
	$88,720,862

In valuing the property of the corporation for the purpose of taxation we will look to and consider the capital stock, corporate property, franchise and gross receipts, the market value

of the shares of stock and bonded indebtedness and all evidence as are afforded by the returns, statements and schedules made by the respondent, together with such other evidence taken as to enable this Board to fairly and equitably fix the actual cash value of the property to be assessed, making due allowance for all non-taxable securities held.

CONCLUSIONS

Value of entire property, (1,115.35)	$23,996,604.14
Less localized property	5,974,471.00
Value entire distributable property	18,022,133.14
Value per mile distributable property	16,158,276.00
Value distributable property in Tennessee (800.02)	12,926,944.00
Less legal exemption ($1000)	12,925,944.00

This Board in distributing this value over the different railroads, lines, divisions and branches in Tennessee, now forming a part of the Nashville, Chattanooga and St. Louis Railway, will look to and consider the character and value of the different railroad lines, divisions and branches, capital stock, corporate property franchise and gross receipts and the market value of the shares of stock and bonded indebtedness, as well as to the intangible value due to the organic relation of the different railroads, lines, divisions and branches to the systems as a whole. The company failed or refused to report the original cost or book value separately and in considering these items, we can only use our judicial knowledge of conditions as we find them.

DISTRIBUTION

Division	Miles	Value Per Mile	Total
Chattanooga Division	124.87	$37,200	$ 4,645,164
Northwestern Division	160.99	21,800	3,509,582
Western and Atlantic	15.45	37,200	574,740
Paducah and Memphis	180.63	14,300	2,583,009
Shelbyville Branch	8.44	3,300	27,852
McMinnville Branch	60.86	5,300	322,558
Columbia Branch	85.78	5,300	454,634
Huntsville Branch	2.58	3,300	8,514
Tracy City Branch	39.18	6,300	246,834
Sequatchie Valley Branch	54.78	5,500	301,290
Orme (Dorans Cove) Branch	2.03	3,300	6,699
Centreville Branch	60.78	3,300	200,574
West Nashville Branch	3.65	12,190.14	44,494
Total	800.02		$12,925,944

Aug. 22, 1938."

2. OPINION OF STATE BOARD OF EQUALIZATION APPROVING ASSESSMENT.

From Record, pp. 100-102

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
Plaintiff in Error,

vs.

GORDON BROWNING, ET AL.,
Defendants in Error.

N., C. & ST. L. RAILROAD COMPANY APPEAL.

This appeal from the assessments made by the Public Utilities Commission, of the properties of the Company, located in Tennessee, was heard by the State Board of Equalization, upon the record as presented to said Commission, the exceptions filed to its assessment, additional affidavits, charts and reports of company officials, argument of counsel and of representative of the Commission, and the entire record, and it is now before us for determination.

This appeal presents to the Board a difficult problem. Each member is *ex officio*. Therefore, adequate time is not ours to give the necessary investigation to entirely satisfy even ourselves, that we may reach an equitable conclusion. However, the responsibility is ours and we would not shirk it.

The exceptions filed are many, and are based upon every method known to the law, touching the valuation and assessment of railroad property, as well as the method used by the Commission, in fixing the assessment.

The assessment made by the Commission, for the years less than the assessment made for the previous years of 1936:

37, and from such former assessment the Company has appealed. The records of the Commission further disclose, that previous assessment of companies property, over a period of ten years follow:

1923-1924	$24,000,000.00
1925-1926	24,795,303.00
1927-1928	24,795,303.00
1929-1930	26,000,000.00
1931-	23,750,000.00
1932-1933	17,000,000.00
1934-1935	16,999,966.00

The record before us shows that the Company agreed to the assessment made for the years 1936-1937. It will be seen, that the assessment made for the year of 1938-1939, is a substantial reduction from the high of 1929-1930, indeed, a reduction in the sum of $9,776,806.00. We are convinced that this reduction of companies assessment from the high point in recent years, is comparable with the reduction enjoyed by owners of other property, or any class of property, within the bounds of this State.

The Company objects to the method used by the Commission in reaching the valuation of its property. It appears in the record, and it was stated in argument, that the Commission, in reaching its conclusion, looked to the capital stock, corporate property franchises and gross receipts, the market value of the shares of stock and bonded indebtedness, and all evidence as afforded by the returns, statements and schedules made by the Company. We assume that their statements are true, and we understand that these elements must be used, as a matter of law, in making such assessments.

Another objection is raised by the Company. That is, the governmental units throughout the State assess other property at less than its actual cash value, while in the same juris-

diction, the Commission assessed its property at its actual cash value, thereby violating the Constitution, on the subject of taxation. The affidavits of William H. Pouder, who is Executive Secretary of the Tennessee Taxpayers Association, and who has compiled a great deal of data on actual cash values, and assessed values of property in the various counties of the State. This information is very interesting, but we are not familiar with the method used by him in reaching his figures on actual cash value, nor do we know how the percentage of cash value was reached for assessable purpose. Many other affidavits are in the record purporting to establish that theory, but we think they are subject to the same objection as that of Mr. Pouder.

For the foregoing reasons, we are satisfied that the assessment of companies property is just and fair to it; and in line with all other like property within the State.

This assessment of companies property at $16,223,194.00 will stand.

Neither Governor Gordon Browning nor Commissioner Walter Stokes, Jr., participated in the hearing of this appeal.

(Signed) A. B. Broadbent.

Keaton & Edwards Concur.

3. OPINION OF THE CIRCUIT COURT OF DAVIDSON COUNTY, TENNESSEE.

From Record, p. 80

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

vs.

GORDON BROWNING, ET AL.

The effect of the writ of *certiorari* was to bring up the entire record for review by the Circuit Court.

We can consider only the facts shown in the certified record to determine if the Public Utilities Commission acted illegally, fraudulently, or exceeded its authority in assessing the petitioner's property. There is no point in asking that the motion by defendant be overruled and the case heard on its merits. In passing upon the motion the Court considers the allegations in the petition and the facts shown in the record. The merits are fully considered in passing on the motion. Should the Court overrule the motion and require the defendant to answer, all that could be stated in an answer would be "Here is the record. We are compelled to, and do, rely upon the record, which is evidence of the fact that there was a legal assessment."

Upon full consideration of the petition, the record in the case and the motion, oral argument of counsel and briefs filed by the counsel, I am constrained to sustain the defendants' motion.

The Court sustains paragraphs Nos. 3, 4, and 5 in the original motion of the defendant State Board of Equalization. Overrules other grounds of the motion.

The Court sustains the amended motion, except ground No. 8, to the effect that the Circuit Court is without jurisdiction, etc., which is overruled.

A. B. NEIL, *Judge*.

4. OPINION OF THE CIRCUIT COURT OF DAVIDSON COUNTY, TENNESSEE, ON MOTIONS FOR NEW TRIAL.

From Record, pp. 81-88.

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

vs.

GORDON BROWNING, ET AL.

There is no question in my mind but that the Circuit Court has the power to review the action of the Board of Equalization and the Public Utilities Commission in determining the value of petitioner's property for the assessment of *ad valorem* taxes. The common law writ of *certiorari* was issued to bring up the record to review the action of these respective Boards and determine the legality of the assessment. This Court has no authority to fix a valuation of petitioner's properties.

Upon the hearing the counsel for petitioners (defendants) moved the Court to dismiss the petition upon several grounds. First, there was no showing upon the record certified to this Court that either the Railroad and Public Utilities Commission or State Board of Equalization "exceeded their jurisdiction, acted illegally, or acted fraudulently," and that the action of said State Board is final and conclusive and not subject to review by the Courts. I will discuss the motion generally.

It is my judgment that the action of the State Board is subject to review, but the only power which the Court has is, as above stated, to determine whether or not the Board "exceeded their jurisdiction, acted illegally, or acted fraudulently."

In determining this question it was clearly within the province of the Court to consider the entire record in passing on the defendants' motion.

Edde v. *Cowan*, 33 Tenn., 293-294, 6 Heisk., 601.
11 Corpus Juris, p. 189, Sec. 329.

There is nothing in the record to show that the Board acted illegally, or fraudulently or exceeded its jurisdiction unless such conclusion can be found in what is alleged to be over-valuation as compared with the value of other property by the various political subdivisions of the State, or the method of determining the value of petitioner's property, or the valuation so fixed was so grossly excessive as compared to other property as to indicate a fraudulent design. The constitution provides that all property shall be assessed at its cash value and, of course, the Assessors of the various political subdivisions of the State, as well as the Railroad Commission and State Board of Equalization must comply with this provision. There is no authority granted to classify property. The law provides the way and manner in which the value of railroad property shall be determined. It is the duty of the Board to comply, or near as possible, with the Statute. Value is a thing not easy to determine. Men will differ when applying the methods prescribed by Statute to determine value, as to what the cash value of any property may be. There are many who insist that property yielding no income is without any real value. We know there are vast properties and business enterprises that are conducted every year at a loss. Mr. Roger Babson recently stated that "out of a list of 1200 stocks listed on the N. Y. Stock Exchange less than one-fourth paid any dividend." We know there are thousands of acres of idle land in Tennessee, as well as other properties, that are being carried by owners at a dead loss. While this is true yet all must admit that these properties have value. The various stocks

mentioned by Mr. Babson have value, and doubtless much greater value than the quotations would indicate. The fact that a dividend is not paid does not indicate even little value. This Court, in passing upon the official acts of the defendant Boards, must presume that the said Boards complied with the law, not only as to methods of determining value but that the result reached by them was lawful. I think it is a basic rule of law that illegality of conduct is never presumed. Surely fraud is never presumed in any Court except where the parties occupy a fiduciary relationship.

It is my judgment, based on the record, that the Public Utilities Commission substantially complied with the law in methods of determining value. I think I have the right to assume that the Board pursued the same method in determining the valuation of other railroads and public utilities in Tennessee. It is unthinkable that a different, and I might say an illegal, method would be adopted as to each of the properties assessed by the Commission. It is contended by petitioner that the assessment is fraudulent, or, to state it in fairer terms, the over-valuation as compared with other properties in the state produces fraudulent results, and is therefore in violation of petitioner's constitutional rights.

If the Court is to consider the value of the petitioner's property as compared with the assessed value of other property (and I look to the entire record as to that) I must compare the present assessment with former assessments in determining if the defendant Boards acted arbitrarily and capriciously, or otherwise.

The record shows a reduction in assessment of approximately ($10,000,000.00) ten million dollars within recent years.

When I heard a similar case several years ago, in which petitioner sought a review of the action of the Public Utilities

Commission in assessing its property, the record showed an increase of approximately double what it had been. I held that such an increase could not be justified and that the record sent up for review fully supported petitioner's contention. While I think (this is my personal conviction) that in recent years all railroads have suffered, due to unfair competition, six or eight years of economic stagnation, the demoralization resulting from government control, yet the courts cannot correct all the wrongs and injustices complained of, nor act as a supervisor of governmental agencies, except to keep them within the limitation of their authority as prescribed by law. All property has decreased in value in recent years, and there has been a decrease in assessment for taxes, including the property of the petitioner.

With the Assessors of the various political subdivisions of the State acting independently of each other and all acting independently of the State Boards of Assessors (Public Utilities Commission) and the State Board of Equalization, I am at a loss to see how there can ever be a proper assessment, that is from a technical legal standpoint.

I can clearly see how that County Assessors in certain counties through which a railroad passes, would place a low valuation on local property and fix a high rate of taxation, knowing or at least believing, that the main cost of county government would be met with taxes from the railroads which were compelled to pay the same high rate upon a one hundred per cent valuation. I cannot say from the record that this is taking place in the instant case, and that the defendant Boards have wilfully connived at it and condoned it. It is suggested in argument of counsel that such practices are being resorted to. The only proof of it is the affidavits of certain individuals that property in certain counties are given a low assessment. It is doubtful in my mind if the County Assessors know how to

determine "cash value" within the meaning of the law. I do not find in any affidavit anything to indicate just how these affiants determined the question of "cash value," or that, in any instance they applied a proper rule of law in arriving at the "cash value" of property.

Every affidavit on file as to valuation represents the opinion of affiants. It may be the opinion of an expert or non-expert. The defendant Boards must have considered and weighed the value to be given these opinions. I have no right to assume they were arbitrarily disregarded. Is it the duty of this Court to say what value should be given to these opinions, and that the defendant Boards did not attach the proper value to such testimony. I think not. Considering the entire record there has doubtless been an under-valuation of property in some localities. The defendant Boards may have been guilty of an error of judgment in placing a proper value upon petitioner's property. But, as said by the U. S. Supreme Court in the case of *Rowley* v. *Chicago and N. W. R. Co.*, 293 U. S., 293:

> "Over-valuation resulting from error of judgment will not support a claim of discrimination. There must be something that amounts to intention, or the equivalent of fraudulent purpose to disregard the fundamental principle of uniformity."

In another case the same Court said:

> "It is not enough in these cases, that the taxing officials have merely made a mistake. It is not enough that the Court, if its judgment were properly invoked, would reach a different conclusion as to the taxes imposed. There must be a clear and affirmative showing that the difference is an intentional discrimination and one adopted as a practice."
>
> *Chicago Great Western* v. *Kendall*, 266 U. S., 94.

The petition avers that the assessment is illegal in that a proportion of the entire system value was allocated to Ten-

nessee solely by consideration of main track mileage. After a full review of the authorities cited by counsel for petitioner and the defendant, I think the weight of authority supports the contention of the defendants that mileage apportionment is valid. It is unnecessary that I refer to and discuss all the cases. The petitioner strongly combats the holding of the Court in the "Backus" case (154 U. S., 42) contending that it was decided at a time "when traffic and revenue statistics were in their infancy," etc., and then the Court stated "There may be exceptional cases." It can be readily seen that there may arise "exceptional cases," but the principle of legality has been so strongly affirmed in that case, and other cases, that I cannot depart from the holding.

The Court would not permit the taxing power to adopt the above method in any arbitrary and capricious manner. In order to invalidate the assessment there must be a clear and affirmative showing that the method adopted was so arbitrary as to indicate an intentional discrimination. Counsel refer to a statement by Mr. Justice Holmes in *Fargo* v. *Hart*, 193 U. S., 495, as follows:

> "In the opinion he recognized that a division by mileage is justified 'so long as it may fairly be assumed that different parts of the line are about equal in value.' We should read this statement in connection with the decision of the Court in *Great Northern R. Co.* v. *Weeks*, 297 U. S., 135, 80 L. Ed., 552, in which the Court said:
>
> "'The problem of apportionment is a difficult one. It is impossible to formulate a rule generally applicable. Controlling conditions vary greatly from time to time. Allocations to be sufficiently accurate for practical purposes must be arrived at by the exercise of sound judgment based on facts that fairly reflect the relation between value of the system as a whole and value of the part within the state.'"

The foregoing is a sound statement of the law as to proper allocation. The Supreme Court of Tennessee used substantially the same language in *Franklin Co.* v. *Railroad,* 80 Tenn., 521-527.

The foregoing fully sustains the view that the assessment cannot be declared invalid on the ground of improper apportionment unless it affirmatively appears that there was a fraudulent design or purpose to disregard the "essential principle of practical uniformity."

It is the plain duty of the Public Utilities Commission to fix a valuation of petitioner's properties for assessment of *ad valorem* taxes, and the valuation so fixed should be "cash" value. If the defendant Board performed its legal duty, and valued the petitioner's property at a figure that represents a fair cash value, and the defendant Board of Equalization, after due consideration of the record and exceptions filed by petitioner approved such assessment, the Court is without power to enter an order or decree declaring to what extent, if any, there has been an overvaluation. This was expressly held in *Savage Co.* v. *Knoxville,* 167 Tenn., 642.

If, after assessing the properties of the various railroads and public utilities of the State at their respective cash values, it is made to appear that other property has been assessed in many political subdivisions of the State by local assessors, at 25%, 50% and 75% and, in some instances at 100%, the question then arises as to whether or not the Railroad and Public Utilities Commission should reduce the amount of its assessments so as to equal an average in percentage value with properties in the various counties that have been under assessed or illegally assessed. If this should be done, the State would find itself engaged in endless litigation with property owners, and a large part of State, County and City revenue would be tied

up indefinitely. In every county where property had been assessed at 75% or more, the property owners could appeal to the Courts for relief on the ground of lack of uniformity in assessment in violation of the Constitution, which provides that all property shall be assessed at its cash value. Surely every property owner paying upon a 100% valuation would be entitled to relief if legality of assessments is to be determined by making a comparison in valuations fixed by the various assessors throughout the State.

In the instant case, petitioners express a willingness to pay upon 75% of the present valuation, contending that this represents a fair cash value. The Court is without power to declare that this is a fair proposition and ought to be accepted. Again, if taxpayers can question the validity of every assessment on the ground of over valuation, and alleged lack of uniformity as compared with undervaluation of other property, and it is proper to fix a valuation by striking an average, it is a question as to when and how often a new average may be called for. The above statement of a vexatious problem is not in any way an exaggeration, and the problem is not new by any means. It was discussed by the U. S. S. Supreme Court in *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S., 441. 67 Law Ed., 340 and other cases. There has been a great conflict in opinion as to what should be done. In such circumstances the problem being difficult of solution and there being no statutory remedy, it is not strange that there should be a diversity of opinion. Since the Court is without power to raise or reduce an assessment, that power being vested exclusively in numerous tax assessors and Boards of Equalization, we are confined to the one problem, to wit: whether or not the defendant Board exceeded its jurisdiction, acted illegally or fraudulently. In every case of alleged over valuation for assessment, the Court will not invalidate it, unless

there is "a clear and affirmative showing that the difference (in valuation) is an intentional discrimination, and one adopted as a practice." *Chicago & G. W. Railroad* v. *Kendall*, 266 U. S., 94, and cases cited.

The validity of the Act of 1939, which legislation is invoked and relied upon by defendant, was not fully discussed and briefed at the original hearing. It may be true that where a litigant has brought suit, seeking redress under rules of law then available, that the Legislature has no constitutional right to legislate him out of Court by an attempt to provide other remedies. It is unnecessary that I should discuss the validity or invalidity of this Act since I am constrained to overrule the motion for a new trial, holding, as I do, that the defendants' motion to dismiss, based upon other grounds, is well taken.

It is contended that if petitioner is required to avail itself of the remedy provided in the Act that it will work an intolerable hardship. Again, if the *supersedeas* is discharged and is not to remain in effect pending appeal that this will result in the same burden. I have no power or authority to purge the assessment of any portion that is alleged to be illegal. There is no authority for allowing the *supersedeas* to remain in effect as to a part of the assessment and discharge it as to the remainder. It is quite true that if petitioner must resort to separate suits, against the various political subdivisions of the state to recover illegal taxes paid or enjoin their collection, that it would be burdensome. At the same time we cannot close our eyes to the fact that if all public utilities in the state, as well as other taxpayers, should invoke the power of the Court and by the writ of *supersedeas* suspend the payment of all taxes until their legality had been finally determined, the State itself might suffer a grievous injury.

The briefs furnished by able counsel show an exhaustive investigation of the legal questions involved. The case has been given the most careful consideration. I cannot discuss in detail all of the cases cited, or review every argument that is advanced in support of petitioner and the defendant. To do so would require an opinion so long and elaborate that counsel would hesitate to read it.

The motion for a new trial is overruled and an appeal granted. The writ of *supersedeas* is abated and discharged. The petitioners are allowed (30) thirty days in which to perfect an appeal. The *supersedeas* will remain in effect during this time to enable the petitioner to make proper application to the Supreme Court for a modification of this Court's order with reference to the writ of *supersedeas*.

A. B. NEIL, *Judge*.

5. OPINION OF THE SUPREME COURT OF TENNESSEE.

From Record pp. 123-134

Davidson Law.

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

Plaintiff in Error

-vs.

GORDON BROWNING, *ET AL.* (STATE BOARD OF EQUALIZATION)

Defendants in Error

OPINION.

The Nashville, Chattanooga & St. Louis Railway filed a petition for *certiorari* and *supersedeas* in the Circuit Court of Davidson County to review the action of the State Board of Equalization in fixing the value of petitioner's property for taxation. The trial judge dismissed the petition and an appeal has been taken to this Court.

The Railroad and Public Utilities Commission is directed by statute (Code 1508) to assess for taxation, for state, county and municipal purposes, all of the property of every description, tangible and intangible, within the state, belonging to railroad companies and other named public utilities. It is provided that the Commission shall assess all of such property biennially, in even years, at its actual cash value as of the same date the properties of other persons are by law assessed. The owners of property assessable under the statute are required by Code 1509 to file with the Commission sworn schedules and statements of certain information.

Section 1526 of the Code is as follows:

> "Upon examination of every such schedule and statement and all other evidence taken by them, the said commission shall proceed to ascertain and determine the value of said property within the state for taxation and assess the same accordingly, taking into consideration the capital stock, corporate property, franchises, and gross receipts, the market value of the shares of stock and bonded indebtedness, and such other evidence as is afforded by said statements and schedules or other evidence taken to enable them to fairly and equitably fix the actual cash value of the properties of such persons."

The railway filed its return with the Commission, and after considering the same, together with other evidence, the Board fixed the cash value of the railway's property in Tennessee, for taxation, at $16,223,199.00, for the biennium 1938-39. The railway filed numerous exceptions to the assessment, which were denied after a full hearing, and the railway prayed and was granted an appeal to the State Board of Equalization. The statute (Code 1533) provides that the Commission shall file with the Board the assessments made by them, together with such records as may be deemed necessary. Section 1534 provides that the Board shall proceed to examine the assessments so made, and are authorized to increase or diminish the valuation placed upon any property valued by the Commission, and are further authorized to request of the Commission additional evidence touching the property assessed; that if the Board so desire, they have the power, without referring any assessment to the Commission, themselves to employ experts, accountants, and to call witnesses to testify upon any assessment certified to them by the Commission, and to call upon the Interstate Commerce Commission for any valuation of property in the office of such Commission; that the assessments shall not be deemed complete until corrected and

approved by the Board. Under Code Section 1535, the Board is required to certify to the Commission the valuation fixed by them upon each property assessed, and the action of the Board "in fixing the valuation upon such property shall be conclusive and final and the valuation so fixed shall be assessed against said property and the taxes due thereunder be paid."

The Board reviewed the assessment of the railway's property and approved the same. Before the Board certified back to the Commission the amount of the assessment, as approved, the railway filed its petition for writs of *certiorari* and *supersedeas* in the Circuit Court of Davidson County. The circuit judge, upon motion of the Board, taking into consideration the entire record as certified to the circuit court by the Board, dismissed the petition and discharged the *supersedeas*. From this action of the circuit judge, the railway has appealed to this Court and made numerous assignments of error. The railway in the presentation of its case, has not followed seriatim the assignments of error. As a matter of convenience we will follow the same course.

The railway complains, in the argument contained in its brief, that "The assessment is not supported by any evidence; is grossly in excess of the value of the property as established by the evidence; was made by methods not calculated to produce a fair and just result and therefore arbitrary and illegal; and was made in violation of the provisions of the statutes controlling the assessment of railroad property."

The assessment made by the Board is made final and conclusive by statute (Code 1535) and is not open to review by the courts on *certiorari*, where the Board has not with reference to the assessment, exceeded its jurisdiction or acted illegally or fraudulently. *Tomlinson* v. *Board of Equalization*, 88

Tenn., 1, 12 S. W., 414, 6 L. R. A., 207; *Anderson* v. *Memphis*, 167 Tenn., 648; *Treadwell Realty Co.* v. *City of Memphis*, 173 Tenn., 168, 116 S. W. (2d.) 997. In *Savage* v. *City of Knoxville*, 167 Tenn., 642, it was held that value placed on property for taxation by duly constituted taxing authorities is not reviewable by the Court, nothing else appearing, since value is a matter of opinion. In *Mossy Creek Bank* v. *Jefferson County*, 153 Tenn., 332, 284 S. W. 64, it was held that mere error in honest judgment of a county board of equalization as to value of property will not obviate binding effort of conclusion, in absence of fraud. The rule announced by the above cases is no longer open to doubt or discussion. Where, however, the Board acts illegally, fraudulently or in excess of its jurisdiction, *certiorari* is the proper remedy. *State, ex rel.* v. *Dixie Portland Cement Co.*, 151 Tenn., 53, 58; *Railroad* v. *Bate*, 80 Tenn., 573.

The provision of the statute that the valuation made by the Board "shall be conclusive and final" presupposes a substantial compliance with the proceedings prescribed with reference to the method of making valuation of railroad property.

The Commission, as affirmatively appears from the itemized assessment made by them, considered all of the elements specified in the statutes (Code 1526). The Commission had before it the return of the railway and other evidence submitted and fixed the value of the railway's property in the sum above stated. No witness, or document in evidence, fixed the exact value as reported by the Commission; but from the facts developed, the Commission held itself able to fairly and equitably fix the actual cash value of the property. No intentional discrimination or fraud on the part of the Commis-

sion or Board is charged or proven. In *Rowley* v. *Chicago & N. W. R. Co.*, 293 U. W., 102, 79 L. Ed., 22, the Court said:

> "There is nothing in this record to suggest any lack of good faith on the part of the board. Overvaluation resulting from error of judgment will not support a claim of discrimination. There must be something that amounts to an intention, or the equivalent of fraudulent purpose, to disregard the fundamental principle of uniformity."

In *Chicago Great Western R. Co.* v. *Kendall*, 266 U. S., 94, 69 L. Ed., 183, 189, the Court said:

> "It is not enough, in these cases, that the taxing officials have merely made a mistake. It is not enough that the court, if its judgment were properly invoked, would reach a different conclusion as to the taxes imposed. There must be clear and affirmative showing that the difference is an intentional discrimination, and one adopted as a practice."

The rule announced in the above cases is generally recognized and needs no additional citation of authority in its support.

The good faith of the Commission and Board and the validity of their action are presumed; when assailed, the burden of proof is upon the complaining party. *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S., 350, 62 L. Ed., 1154.

It is contended for the railway that the Commission and Board should have made the assessment on the basis of capitalization of net income at a rate which would measure a fair return to the investor in the property, or, at least, that such method should have been made the predominant factor in arriving at the value of the property. Capitalization of net income is not specified in Section 1526 of the Code; but this factor could have been considered along with other elements

in fixing the value of the property. Incorporated in the assessment made by the Commission under the caption "Earnings" is a tabulated statement of net operating income for the years 1933-1938. A statement filed by the railway showed net operating revenue for the years 1931-1937 averaged $947,530.60 per annum, and that the net revenue from non-operating property for the seven year period average $13,747,28, making a total average net operating revenue of $961,277.88. The insistence is that if this average net revenue be capitalized at 6%, a value of $16,021,298 is shown for the entire system as compared with the $23,996,604.14 fixed in the assessment. The statement of average income was considered by the Commission, as is shown by the following statement of one of the Commissioners made on the argument before them, "x x x to see what the trend was, whether the trend was upward or downward with the company, as justification for reducing or raising the assessment, so that was largely the purpose of having that in the brief, was what I thought." Greater weight was given to the most recent figures "to judge present day conditions."

We are unable to agree that the Commission, or the Board, was under any legal compulsion to make the assessment on the basis of capitalization of net income, or to make net income a predominent factor in arriving at the value of the property. A railroad is to be assessed according to its value as a railway, by taking into consideration the elements specified in Code, section 1526, which includes "other evidence taken to enable them to fairly and equitably fix the actual cash value of the properties." Counsel for the railway refers to *Railroad v. State*, 55 Tenn., 798, as approving decisions holding that "a tax can only be just and equal on railroad corporations by being assessed upon the profits." The court did not approve this as an exclusive method of ascertaining value; on the contrary,

the court said, "We can conceive of no better criterion by which its value can be ascertained, than, first, the value of the structure, superstructure and properties, and then the profits which may enure to its owners in its operation." The Court further stated, "A tax on a corporation may be proportioned to the income—revenue, as well as to the franchise granted, or the property assessed," citing *Minot, Jr.* v. *Railroad*, 18 Wall., 206 (21 L. Ed. 888). *Railroad* v. *State, supra*, was decided prior to the enactment of the first railroad assessment law in 1875.

In *Great Northern Ry. Co.* v. *Okanogan County*, 223 Fed., 198, it is said:

> "The value of a completed railroad is not easy of ascertainment. Railroads are not usually bought and sold on the open market. Their value is in use, rather than in exchange, and many elements go to make up that value. The cost of construction or reproducing, the income, the earning capacity, the value of stock and bonds, have all been taken into consideration by the courts. None of these elements are controlling, however."

A like statement to the above is to be found in 26 R.C.L., 189.

It is complained by the railway that the apportionment of distributable property to Tennessee on mileage basis is invalid. The Commission found the railway's distributable property in Tennessee to be the average value per mile of the system distributable property multiplied by the number of miles of main track in Tennessee. On the basis of a total mileage in the system of 1,115.34, of which 800.02 miles is in Tennessee, and the total entire value of distributable property to be $18,022,133.14, the Commission assigned to Tennessee for taxation a value of $12,926,944. It is contended by the railway that this method of allocation is contrary to statute

(Code 1526) and has the effect of imparting into Tennessee for Taxation values located in other states, contrary to Article 1, section 8, and Article 2, section 28, of the Constitution of Tennessee, and the due process clause of the Fourteenth Amendment to the Constitution of the United States. It is further contended that the value of the entire property ($23,996,604.14) "is in substantial excess of any reasonable opinion or estimated of value supported by or deducible from any evidence upon which such assessment was made, and which finding of value is not supported by or based upon any evidence in the record upon which the assessment was made, all of the evidence showing that the actual value is not in excess of $16,021,298." This is a renewal of the contention that the value of the property should have been fixed on the basis of capitalization of net revenue of the system, and not upon the basis adopted by the Commission.

In *Railroad* v. *State*, *supra*, at page 797, the Court said, "If it be an interstate railroad, as in this case—a part in this State and a part in another—we know of no better plan to fix the taxable value of that portion lying in this State, than to ascertain what proportion the latter bears to the whole. Upon this subject; however, there is great conflict of authority, and great contrariety of judicial reasoning and ruling."

In *Franklin County* v. *Railroad*, 80 Tenn., 521, 540, the Court said:

> "No part of the mere roadway can be said to be more valuable than any other part, when considered as a track for the exercise of the franchises of the company as a common carrier. It is, like the franchise itself, a unit for the purposes intended; these purposes being not merely the use of the road for the profit of the company, but its use for the benefit of the public. Any interruption of that use is a public as well as a private calamity. 'It may well

be doubted,' says the Supreme Court of the United States, 'whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole.' State Railroad Tax Cases, 92 U. S., 608."

In *Pittsburg, C. C. & St. L. R. Co* v. *Backus*, 154 U. S., 421, 38 L. Ed. 1031, the Court quoted with approval the above paragraph taken from *Franklin County* v. *Railroad*, and held, that the value of one part of a single continuous line of railroad is fairly estimated by taking the part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road, unless accompanied with proof that portions of the road outside of the state were of largely greater value than any similar length of road within the state. In *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S., 439, 38 L. Ed., 1041, that in assessing a part of a railroad within a state, the other part of which is in an adjoining state, when the assessing board ascertains the value of the whole line as a single property, and then determines the value of that within the state, upon the mileage basis, that is not a valuation of property outside the state, if no special circumstances exist to distinguish the conditions in the two states, such as terminal facilities of enormous value in one and not in another.

The record in the instant case does not disclose that the portions of the railroad outside Tennessee are largely of greater value than the portion within the State, or that any special circumstances exist to show a greater value outside the State than within the State. The railway contends, however, that by breaking down the whole net revenue so as to show the portion thereof earned within the State as compared to that

earned out of the State a greater value is shown to exist out of the State. The railroad was valued as a whole by the Commission. All of the elements set forth in Code, section 1526 were considered. Under the well established rule for assessment on a mileage basis, no exceptional facts appearing, the portion of the railroad in Tennessee could not be treated as an independent line, disconnected from the part without the State. Furthermore, the exception to the rule contemplates, we think, that it be clearly shown that the portion of the road out of the State has a greater value than the part within the State, such as terminal facilities or other improvements not found within the State.

Our conclusion on the question of allocation is that the assessment did not violate any of the railway's rights under the State Constitution, nor under the Fourteenth Amendment to the Federal Constitution.

Another complaint made by the railway is that the Commission and Board assessed its property at actual value, while the property of all other taxpayers was assessed at two-thirds of its actual value. A large number of affidavits made by local assessors were filed with the Commission to the general effect that affiants intentionally and systematically assessed other property for taxation at an amount not exceeding 75% of its value. Affidavits from others to like effect were also filed.

County assessors are required by law to assess property at its actual cash value (Code 1349). And they take an oath of office that they will assess all property at its actual cash value (Code 1343). They must make oath to the assessment lists which contains the statement that they have assessed all property at its actual cash value (Code 1375). The assessment lists are returned to the county court clerk.

The assessments as made by the county assessors are not final. On the contrary, the assessment lists are required to be delivered by the county court clerk to the county board of equalizers (Code 1424). Under Code 1426, the duties and powers of the board are defined. It is made their duty "to carefully examine, compare, and equalize the county assessments." It is further provided therein that, "Said board shall have the power, and it is hereby made its duty, to increase or lower the entire assessment roll or any assessment contained therein, so as to equalize the assessment of all property contained therein, *and make such assessment conform to the actual cash value of the property described in the assessment.* If the property described in said assessment lists or any part thereof *shall have been assessed at less than the actual cash value thereof, the value of the same shall be increased so as to conform to the actual cash value thereof,* x x x." (Italics ours.)

Under Code 1434, the county board upon returning the assessment roll to the clerk are required to append to the same a verification, signed by each member, that they have equalized and fixed the value of all property at the actual cash value thereof.

Under Code 1440, it is made unlawful for board to equalize at less than actual cash value. It is made the duty of the county board of equalizers to transmit to the State Board of Equalization a summary of the assessment as completed by it.

The State Board of Equalization is directed to meet at places throughout the State, selected by them. (Code 1448.) And it is provided in section 1456, that the Board *"shall have jurisdiction of, and it shall be its duty, to equalize during its*

session the assessments of all properties in the State" and its action *"shall be final and conclusive as to all matters passed upon, x x x subject to judicial review."* (Italics ours.)

If the county assessors and the few members of county boards of equalizers making affidavits on the hearing before the Commission assessed property at less than actual value, and did so intentionally and systematically, there is no showing whatever that the members of the State Board of Equalization violated their oath of office by underassessing property. In the absence of a contrary showing, it must be assumed that the State Board did their duty. There is neither allegation nor proof that the State Board intentionally and systematically refused to equalize assessments at actual value. The good faith of such officers and the validity of their actions are presumed. *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S., 350, 62 L. Ed., 1154. In order to support a claim of discrimination under the equal protection clause of the Fourteenth Amendment there must be something that amounts to an intention or the equivalent of fraudulent purpose to disregard the fundamental principle of uniformity.

Another complaint made by the railway is that the Commission and Board included in the assessment interest bearing securities and corporate stocks to the value of $2,484,000, not subject to taxation. The assessment shows on its face that the value of the railroad was fixed, "making due allowance for all non-taxable securities held." The securities were considered by the Commission merely as reflecting on the present financial condition of the railway.

It is complained that the Commission included 3.65 miles of railroad, known as the "West Nashville Branch," as main track mileage in computing the value of the railway's distrib-

utable property. It is asserted that all of the evidence shows this line to be side tracks. The railway's own return shows this 3.65 miles to be main track.

From our examination of the record we are satisfied that the assessment made on the property of the railway was fair and equitable. There is nothing to support the contention that the assessment was discriminatory or arbitrary.

The record shows (ex. 19) that the property of the railway in Tennessee, was valued for taxation in former and 1938-1939 years as follows:

"1923-1924	24,000,000
1925-1926	24,795,303
1927-1928	24,795,303
1929-1930	26,000,000
1931-	23,750,000
1932-1933	17,000,000
1934-1935	16,999,966
1936-1937	16,499,998
1938-1939	16,223,194"

The former valuations were not made the basis for the 1938-1939 assessment; but they may be looked to on the argument that the railway's property had declined in value.

The Board in its opinion stated, "It will be seen, that the assessment made for the year 1938-1939, is a substantial reduction from the high of 1929-1930, indeed, a reduction in the sum of $9,776,806.00. We are convinced that this reduction of companies assessment from the high point in recent years, is comparable with the reduction enjoyed by owners of other property or any class of property, within the bounds of this State."

It is argued that property generally, throughout the state, is assessed for taxation at less than cash value, and that the

Court should take judicial knowledge of such underassessment. Whatever may have been the practice in this regard in former times, it is our belief that since 1930 assessments generally are and have been higher than the actual cash value of the property assessed.

It is argued that the Commission "arbitrarily assessed the railway's distributable property at the valuation placed upon it for the preceding biennium, notwithstanding the abandonment of 38 miles of Tennessee main track which the Commission had in said previous assessment included at a valuation of $15,407.93 per mile, aggregating $587,500." The argument seems to be that the Commission and Board should have deducted from the assessment the sum of $587,500 representing the value alleged to have been placed on 38 miles of main track in the assessment of 1936-1937, and asserted to have been thereafter abandoned. The railway returned 800.2 miles of main track for the 1938-1939 assessment and that is the mileage assessed. The 38 miles was not included in the return or the assessment. In considering the various factors and elements going to make up the distributable value of the properties for 1938-1939, the Commission and Board found the total value thereof (excluding the 38 miles above mentioned) to be $12,926,944, which assessment it is asserted is the same as 1938-1939. The total assessment for 1938-1939 was $276,804 less than for the previous biennium. The valuation for assessment of the 800.2 miles of main track returned by the railway for assessment fixed by the Board, under the statute and authorities hereinbefore cited, cannot be reviewed by this Court, the Board not having exceeded its jurisdiction or acted illegally.

The opinion of the Board contains the following:

"This appeal presents to the Board a difficult problem. Each member is *ex officio*. Therefore, adequate time is

not ours to give the necessary investigation to entirely satisfy even ourselves, that we may reach an equitable conclusion. However the responsibility is ours and we would not shirk it."

It is contended that this statement shows that the Board made the assessment, or approved the assessment without making necessary investigation. The opinion specifically refers to the railway's exceptions and there is nothing to show that they were not given consideration. While not dealt with seriatim in the opinion, the conclusion reached was that the assessment made should stand. Various additional affidavits, charts and maps were introduced by the railway before the Board and there is nothing to show that these were not considered by the Board. On the contrary the record shows that the exceptions were fully argued before the Board and the able counsel for the railway and the Board acquainted the Board with all the pertinent facts and with their respective contentions. The assessment as made by the Commission, together with the whole record as made up before it, was filed with the Board, as required by Code 1535. The Board "proceeded to examine the assessment so made," as required by Code 1534. It received additional evidence from the railway. It is mere empty assertion to say that the Board did not give proper or sufficient consideration to the cause. To upset the decision of this *quasi* Court because of the expression set out above, which was immediately followed by the language, "However, the responsibility is ours and we would not shirk it," when there has been a full hearing on the exceptions, would be wholly unwarranted, especially when on a full hearing by the Board it was found that the exceptions were without merit, and subsequently so found, in effect, by the circuit judge.

After due consideration, we find all of the assignments of error to be without merit. The result is that the judgment of the trial court is affirmed. The railway will pay the costs of the appeal.

D. W. DeHaven,
Judge

Cook, J., and Kennerly, Sp. J., concur.

McKinney, J., and Chambliss, J., dissent.

6. DISSENTING OPINION OF MR. JUSTICE McKINNEY.

From Record, pp. 135-138

Davidson Law

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
Plaintiff in Error,

vs.

GORDON BROWNING, ET AL,
Defendants in Error.

DISSENTING OPINION.

I am of the opinion that the State Board of Equalization has not complied with the law, and for that reason the case should be remanded to that body in order that it may find the assessable value of the Railway property.

The State Board of Equalization, as I see the matter, has proceeded upon the theory that it is an appellate board to review and correct the errors committed by the Railroad and Public Utilities Commission when, according to my interpretation of the law, it is the final tribunal for fixing the value of the Railway property, and the report of the Commission is only advisory and informative. The Commission assesses the property and then certifies same to the State Board of Equalization for its final determination as to its cash value.

Under the law it is made the duty of the Railway to file a sworn schedule on the first day of April biennially, in the even years, giving the Commission the information set forth in section 1509 of the Code. Other pertinent statutes are as follows:

1526. "Upon examination of every such schedule and statement and other evidence taken by them, the said commission shall proceed to ascertain and determine the value of said property within the state for taxation and assess the same accordingly, taking into consideration the capital stock, corporate property, franchises, and gross receipts, the market value of the shares of stock and bonded indebtedness, and such other evidence as is afforded by said statements and schedules or other evidence taken to enable them to fairly and equitably fix the actual cash value of the properties of such persons."

1533. "Said assessments shall be completed on or before the first Monday in August, and within ten days from the first Monday in August, the owner of any property assessed may appear and file exceptions to said assessment, together with such evidence as they may desire to submit as to the value of the property assessed, and at the expiration of said ten days, said commission shall reassemble and examine such additional evidence and exceptions as may have been filed, and act thereon, either changing or affirming their valuation. And on or before the first Monday in September, said commission shall file with the board of equalization the assessments made by them, together with such records as may be deemed necessary."

1534. "The state board of equalization shall proceed to examine said assessments so made by the commission, and they are authorized to increase or diminish the valuation placed upon any property valued by said commission, and are further authorized to require of said commission any additional evidence touching one or more of the properties assessed, and shall consider such additional evidence so furnished in fixing the correct value of any property so assessed, and said assessments shall not be deemed complete until corrected and ap-

proved by the said board of equalization; and the governor is authorized to call said commission at any time to perform the duties imposed upon them; provided, however, that if said board of equalization shall so desire, they shall have the power without referring any assessment to said commission, themselves to employ experts, accountants, and to call witness to testify upon any assessment certified to them by said railroad commission; and said board of equalization shall have the same powers to compel attendance of witnesses, production of books, papers, and documentary evidence as is by this statute given to said commission. Said board of equalization shall have the right to call upon the interstate commerce commission for any valuations of property in the office of the interstate commerce commission and evidence in possession of said commission in support of such valuations.

"All of the evidence thus acquired by said board of equalization shall be considered by them in addition to the evidence transmitted to said board by said commission in support of the assessment so fixed by said commission.

"Any expense incurred by said board in calling for the additional proof as to the value of any property certified to them by said commission shall be by said board of equalization certified to the state comptroller and paid by him out of any moneys in the treasury not otherwise appropriated."

1535. "On or before the third Monday in October, said board of equalization shall certify to the commission the valuation fixed by it upon each property assessed under this law, and the action of the board of equalization in fixing the valuation upon such property shall be conclusive and final and the valuation so fixed shall be assessed against said property and the taxes due thereunder be paid."

From the foregoing statutes it appears that the responsibility for finally fixing the value of the Railway property is vested in the State Board of Equalization, and it cannot discharge that duty by giving the report of the Commission a perfunctory and superficial examination and consideration.

The report of the State Board of Equalization begins with this statement:

"This appeal presents to the Board a difficult problem. Each member is *ex officio*. Therefore, adequate time is not ours to give the necessary investigation to entirely satisfy even ourselves, that we may reach an equitable conclusion."

As I construe the statutes, the assessment by the Commission does not become final until approved by the State Board of Equalization; that Board being vested with power to either increase or decrease the value placed upon the Railway property by the Commission even though there has been no appeal. The Board states very frankly that it did not have time to make the necessary investigation to enable it to reach an equitable conclusion. But the statute imposes such duty upon it, and until such investigation and consideration is made it has not complied with the law. In this connection I wish to emphasize the fact that the statute authorizes the Board "to employ experts, accountants, and to call witness to testify upon any assessment certified to them by said railroad commission." They also have the right to call upon the Interstate Commerce Commission for any valuation made by it of the involved property. The State Board of Equalization is, therefore, vested with all necessary authority, and has the facilities at its disposal to enable it to arrive at an equitable and just valuation of the Railway property.

The State Board of Equalization, furthermore, seems to have been largely influenced by the 1936-1937 assessment of the Railway property, which, it states, the record shows was agreed to by the Railway. Such statement is not supported by the record; but if it was that would be no criterion of value, since the statute expressly provides the method by which such value is to be ascertained.

The Board in its report makes the following additional statement:

"It appears in the record, and it was stated in argument, that the Commission, in reaching its conclusion, looked to the capital stock, corporate property franchises and gross receipts, the market value of the shares of stock and bonded indebtedness, and all evidence as afforded by the returns, statements and schedules made by the company. We assume that their statements are true, and we understand that these elements must be used, as a matter of law, in making such assessments."

It is apparent from this statement that the Board did not consider these elements, as it was its duty to do, but proceeded upon the assumption that the Commission had considered same and had, therefore, arrived at a valuation in the manner provided in the statute.

Counsel for the State content that there is no fixed, positive or definite formulation for the valuation of such property. We are unable to accede to this position of counsel. The Board, necessarily, is to arrive at the valuation by the method set forth in the statute for the ascertainment of its value by the Commission. It was certainly never intended that the Commission should use one formula and the Board a different one.

This is a case of great importance both to the State and the Railway, and one that the Board should fully and carefully investigate and consider. Only three of the five members composing the Board participated in the hearing and consideration of this case. While the statute provides that three members of the Board shall constitute a quorum, I am of the opinion that as a matter of policy it would be better in a case of this magnitude and importance if it were heard, investigated and considered by the entire membership of the Board in order that as full and complete justice may be arrived at as is humanly possible.

(Signed) McKINNEY, J.

7. DISSENTING OPINION OF MR. JUSTICE CHAMBLISS.

From Record, pp. 138-143

Davidson Law

NASHVILLE CHATTANOOGA & ST. LOUIS RAILWAY,
Plaintiff in Error,

vs.

GORDON BROWNING, ET AL,
Defendants in Error.

DISSENTING OPINION.

I find myself in accord with the views expressed by Mr. Justice McKinney in his dissenting opinion. Whether because of "inadequate time * * * to give the necessary investigation," as expressed in the opinion handed down by the Board of Equalization, or because of an under estimate by the members of that Board of the extent and nature of the duties which I understand the law imposes upon them in the making of railroad assessments, as distinguished from assessments of real estate generally, I am satisfied that errors appear.

I fully appreciate that the Circuit Court and this Court are restricted to the correction of errors involving excess of jurisdiction, illegality or fraud, without power to substitute our opinion as to value for that of the assessing tribunal, but no such restriction applies to the Board of Equalization. That Board sits as a quasi-Court with *de novo jurisdiction,* with the obligation to render judgments of appraisal of value for taxation upon an *independent* investigation and examination into all the evidence. It is this judgment, so arrived at and exercised independently, which is made "conclusive and final."

It seems to me quite obvious from the recitals of the brief opinion filed, that the judgment fixing the assessment in this case was not so arrived at, but was rested largely upon two matters referred to in the opinion, (1) statements, or conclusions, in the report of the Railroad Commission, which, says the opinion, "we assume * * * are true" (that is, have adopted without independent examination and verification); and (2) the record of assessments of this Railroad for previous years, set out in the opinion.

I realize the difficulty of the task which I understand the law imposes on the Board of Equalization, composed, as it is, of gentlemen whose duties incident to their several highly important offices are so exacting as to leave them little time for the discharge of their extra "ex officio" duties as members of this Board. To meet this situation, however, the legislature has expressly provided that the Board may employ their own experts and accountants and bring in evidence from various sources of different kinds, including such as may be in possession of the Interstate Commerce Commission, all in order that the Board of Equalization may fit itself to make its own finding and appraisal of values on which to base its assessments. Now it does not appear that any such course was followed, but, as already suggested, the Board *assumed* the correctness of the conclusions reported by the Railroad Commission and adopted them *in toto*. However competent and capable the distinguished gentlemen composing the Railroad Commission are, the duty and responsibility is imposed, not upon them, but upon the Board of Equalization, of rendering a judgment, which shall be "final and conclusive," after making for itself the investigation necessary to enable it to fix for itself these values.

It was exceedingly important to the petitioner in this case that the broad *de novo* jurisdictional powers of the Board of

Equalization should be fully and carefully exercised,—that "adequate time" should be taken for "the necessary investigation" that the Board might "reach an equitable conclusion."

In addition to, and in line with the general criticism which I have felt constrained to make of the inadequacy of the examination apparently made by the Board of Equalization, in the exercise of its independent and final jurisdiction, an examination of the pertinent records convinces me that several specific errors appear going to the *legality* of the judgment of the Board of Equalization before us for review:

1. Reference has been made to the consideration given assessments of this Railway's properties for former years. One third of the brief opinion of the Board is devoted to a comparative analysis of these former assessments which are quite apparently given predominant consideration. I find no authority for thus using assessments made in former years as a basis of value. The petition shows, and common knowledge of affairs supports, that radical and fundamental changes have taken place in the last few years in the conditions which basically affect the value of the railroads, so that assessments of former years furnish today no fair controlling criteria for appraisal of this particular, and peculiar class of property. For example, what is known as the "franchise" of a railroad, formerly a highly important element of value, has today greatly less value. A franchise is a special privilege, originally granted to a subject by the Crown, now in this country by the Government. It implies profitable advantages, not enjoyed generally, or competitively. A common incident of a franchise is a degree of monopoly. The grant to railroads carries the right of eminent domain, for instance. Inherent, therefore, in the franchise of a railroad, were former advantages which yielded automatically more or less large profits, not to be generally enjoyed. Now, this is changed, and it must be conceded—all men know it—that practically all of this element of value,

formerly, the dominant incident of the franchise, has been wiped out, in large measure by the policies and contributions to competition of the Government itself. This competition in transportation of passengers and freight, graphically set forth in the proof in the record, has apparently not only wiped out the major elements of value of the franchise, but has diminished greatly the "use" value of the railroads as a whole, and calls for at present a thorough going investigation of basic elements of value applicable to present day conditions, which it is apparent the Board of Equalization, for reasons indicated, did not undertake, or have opportunity, to make.

2. It is complained for petitioner that the Board of Equalization refused to regard the net earnings as an important element in fixing value. Attention is called to the argument before the Board of Equalization of Mr. Hendley, (expert and spokesman for the Railroad Commission) that "not once in the law do we find the word 'net'"; that "the elements principally are the 'gross' receipts, the value of the stocks and bonds and the value of the corporate property"; and in commenting on the assessment made by the Railroad Commission, the opinion of the Board of Equalization says that it was the "gross receipts" which were considered. While it is true that in Code Section 1526 the expression "gross receipts" is used, we think it clear that the law as a whole contemplates that the operating expenses shall be considered in the same connection, thus arriving at the "net." The language of this section as a whole so requires, calling, as it does, for statements and schedules and other evidence as a basis for fixing the values. Also, Section 1509, setting out more specifically the information to be laid before and considered in making the assessment, expressly couples together the gross receipts and the expenses.

3. I think the record as a whole indicates that, contrary to the law applicable, certain intangibles of considerable amount, non-taxable under what is known as the Hall income tax law, have been taken into account in fixing the valuation arrived at as a whole. If this is so, then the assessment has to this extent, certainly, been illegally arrived at. The brief opinion is silent on this question, much stressed by petitioner, but it does appear that Mr. Hendley, the official spokesman for the Railroad Commission, in presenting the case to the Board of Equalization, did specifically call attention to the fact that the Railway held these valuable assets and this item was thus plainly brought to the attention of the Board in support of the assessment figures as reported by the Railroad Commission. It seems to me that it may be fairly assumed that these items were taken into account in fixing the assessment. In arguing before the Board of Equalization for its adoption of the assessment figures reported by the Railroad Commission, Mr. Hendley, above mentioned, said, "The N. C. & St. L. Railway unlike other railroads have a nice cash surplus on hand. Its financial set up is good. On January 1 of this year they had on hand cash and non-taxable Federal bonds and notes in the amount of $3,569,801.00 to which should be added the $140,000.00 earned since January, 1938." The inference seems plain that these elements showing the Railway's "financial set up is good" were considered in appraising the corporation's properties as a whole—otherwise why mention them? Commenting on this matter, the majority opinjon says, "The securities were considered by the Commission merely as reflecting on the present financial condition of the Railway." Obviously, such consideration reflected an increased value and thus served to bolster up the assessment as a whole.

4. Reference has been made to apparent reliance on assessments of former years. It is shown that 38.96 miles of

main track of petitioner's railroad, formerly assessed at $590,292.95, had been abandoned, with the approval of the Interstate Commerce Commission. This reduced the total track mileage in Tennessee from 838.98 to 800.02 miles, yet the value fixed for assessment here is identical with that made in the greater mileage for 1936, being, in both instances, $12,926,944.00. This seems to demonstrate that the assessment for this previous year was not only considered, but adopted.

5. The evidence appears to show that 3.65 miles of track, described as West Nashville Branch, is an industrial or side track and that this trackage has been included in the assessment as returned as main track mileage.

Without further elaboration, I concur with Mr. Justice McKinney that justice demands that the case should be remanded to the Board of Equalization for a re-determination of the assessment.

(Signed) CHAMBLISS, J.

8. OPINION OF SUPREME COURT OF TENNESSEE ON PETITION TO REHEAR.

From Record, pp. 143-145.

Davidson Law

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY
Plaintiff in Error

vs.

GORDON BROWNING, ET AL.,
Defendants in Error

OPINION ON PETITION TO REHEAR.

This cause is again before the court on the railway's petition to rehear and the reply of the State Board of Equalization thereto. The court discussed in its opinion the questions made by the railway's assignments of error and decided the same. Most of the petition to rehear is devoted to a reargumen. of some of these questions. One new question is sought to be raised by the petition. It is asserted that the localized property of the railway was assessed at $3,297,250 by the Board "without knowing or inquiring how the aggregate is made up," and that the Commission withheld from the Board "all information of its valuation of localized property items." This attack on the assessment was not specifically made by any of the assignments of error filed in this court. Rule 14 of this court provides (fol. 275) among other things as follows: (173 Tenn., 874.)

"Assignment of Error. The assignment of errors shall contain in the order herein stated:

(1) * * *.

"(2) A statement of the errors of fact or law relied upon to reverse or modify the same, showing *specifically* wherein the action complained of is erroneous, and how it prejudiced the rights of the appellant, or plaintiff in error, and reference to the pages of the record where the ruling of the court on matters constituting errors of law appears; and in case it is an error of fact, to the pages of the record where the testimony is to be found relied upon to sustain the same." (Italics ours.)

The railway, as before stated, did not specifically assign as error the action of the Commission and Board in assessing its localized property at $3,297,250. The rule assumes *prima facie* the correctness of the proceedings of the inferior courts, and imposes on parties assailing them the duty of specifically pointing out the errors of which they complain. *Denton* v. *Woods*, 86 Tenn., 37; *Woods* v. *Frazier*, 86 Tenn., 500. A subject on which no assignment of error has been made need not be considered on appeal. *Hawkins* v. *Hubbell*, 127 Tenn., 312.

The exceptions filed before the Commission did not specifically complain of the assessment on the localized property. The petition for certiorari alleged that it prayed an appeal to the Board "to the end that said exceptions might be there further considered," and it was further averred that it was notified "that its exceptions as filed with the Railroad and Public Utilities Commission would be considered by the (fol. 276) State Board of Equalization on November 2, 1938, and said hearing was accordingly held upon the evidence and record transmitted to the Board by the Railroad and Public Utilities Commission." The railway in its petition for certiorari to the circuit court exhibited therewith its exceptions. It was not alleged in the petition for certiorari that the assess-

ment made on the localized property was illegal or void. No such issue was specifically tendered by the petition.

This court did not hold that the examination by the Board of the assessment made by the Commission was dependent upon the railway's appeal or limited or restricted thereby. On page 2 of the opinion the substance of Code 1534 defining the duties of the Board with reference to the assessment returned by the Commission is set out. But, as shown by the record, the railway in its petition for certiorari to the circuit court did not specifically allege that the assessment of its localized property made by the Commission and approved by the Board was invalid for any reason.

The railway's motion for a new trial, filed in the Circuit Court, does not contain in any of the grounds therefor any specific complaint that the trial judge held the assessment of localized property valid, or that he refused to pass upon such question.

Rule 14 (5) of this court provides that the grounds upon which a new trial is sought in this court "will not constitute a ground for reversal, and a new trial, unless it affirmatively appear that the same was specifically stated in the motion made for a new trial in the lower court, and decided (fol. 277) adversely to the plaintiff in error, but will be treated as waived, in all cases in which motions for a new trial are permitted." The following is recited in the rule:

"This is a court of appeals and errors, and its jurisdiction can only be exercised upon questions and issues tried and adjudged by inferior courts, the burden being upon the appellant, or plaintiff in error, to show the adjudication, and the error therein, of which he complains. *R. R. Co.* v. *Johnson*, 114 Tenn., 640; *Wood* v. *Frazier*, 86 Tenn., 501; *Jacks* v. *Wil-*

liams-Robinson Lumber Co., 125 Tenn., 123; *Hobbs* v. *The State*, 121 Tenn., 413; *Tennessee Central R. R. Co.* v. *Brown*, 125 Tenn., 351."

For the reasons stated above, the railway cannot be heard to complain in this court of the amount of the assessment made on its localized property.

The petition to rehear contains some erroneous inferences and deductions from matters decided by the opinion of the court, we are responsible alone for the opinion and not for the construction, inferences or deductions that counsel may place thereon.

The Board has jurisdiction. It did not act illegally. The railway makes no claim of fraud as against the Commission or the Board. The valuation placed on the properties of the railway for taxation by the Board cannot be reviewed by the courts, in the absence of fraud. See authorities cited in opinion.

Our conclusion is that the petition to rehear is without merit and must be overruled.

DEHAVEN, *Judge*.

p 2.

SUPREME COURT OF THE UNITED STATES.

No. 789.—October Term, 1939.

Nashville, Chattanooga & St. Louis Railway, Petitioner,
vs.
Gordon Browning, et al., constituting the State Board of Equalization of Tennessee.

On Writ of Certiorari to the Supreme Court of the State of Tennessee.

[May 20, 1940.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This case is here to review a judgment of the Supreme Court of Tennessee sustaining an assessment of petitioner's property, tangible and intangible, under that state's *ad valorem* tax law. All Tennessee property is subject to such a tax; but there are two schemes of procedure for making assessments, one for public service corporations and one for other taxpayers. As to ordinary property the task of valuation rests upon officials of the various counties. For public service corporations the assessments must be made by the Railroad and Public Utilities Commission, which is commanded to ascertain the "actual cash value" of corporate property situated in Tennessee. Tennessee Code, § 1526. Since petitioner operates an interstate railroad, the value of its entire system and not merely of that portion within Tennessee had first to be ascertained. This the Commission estimated at $23,996,604.14. From this figure was deducted the value of petitioner's "localized" property, that is, its terminal buildings, shops, and non-operating real estate. The remaining sum served as the base for calculating the value of what in the language of Tennessee law is called the utility's "distributable" property attributable to Tennessee, § 1528, which the Commission ascertained by taking the ratio which petitioner's mileage in Tennessee bears to its total mileage. This was found to be $12,925,944; and that is the amount of the assessment here in dispute. From this action by the Commission petitioner appealed.

in accordance with the local statute, to the State Board of Equalization, respondent here. After hearing and by formal opinion, the Board confirmed the Commission's valuation.

In anticipation of a certification by the Board of its final assessment preliminary to the collection of taxes based upon it, the Railway brought an appropriate proceeding in the state courts to set aside what it claimed was the void "excess of the fair taxable value" of its property. This suit was dismissed by the trial court and its judgment was affirmed by the Supreme Court of Tennessee with two justices separately dissenting. — Tenn. —. Because of petitioner's claim that the result below was inconsistent with decisions of this Court, we granted certiorari. 309 U. S. —. The assessment was contested below on objections grounded in both state and federal constitutions. Here, of course, only federal questions are open. Petitioner claims that the challenged assessment violates the Fourteenth Amendment in its guarantees of due process and the equal protection of the laws, and is offensive to the Commerce Clause.

We shall first consider the claim based on the historic implications of the Commerce Clause as a limitation upon the state's taxing power. Petitioner argued that Tennessee has taxed values which are in truth outside its borders, thereby burdening that which the Commerce Clause has left free. The guiding principles for adjustment of the state's right to secure its revenues and the nation's duty to protect interstate transportation are by this time well settled. The problem to be solved is what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions. Basic to the accommodation of these conflicting state and national interests is realization that by its very nature the problem is incapable of precise and arithmetic solution. In tapping these common sources of revenue a state cannot, we have held, use a fiscal formula, whatever may be its appearance of certitude, to project the taxing power of the state plainly beyond its borders. *Wallace* v. *Hines*, 253 U. S. 66. In the light of these principles, Tennessee has not overstepped its bounds.

In basing its apportionment on mileage, the Tennessee Commission adopted a familiar and frequently sanctioned formula. *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *Pittsburgh &c. Railway Co.* v.

Backus, 154 U. S. 421; *Branson* v *Bush*, 251 U. S. 182. See 2 Cooley on Taxation, pp. 1660-64. Its asserted inapplicability to the particular situation is rested on petitioner's evidence as to the comparative revenue-producing capacity of its lines in and out of Tennessee. But both the Commission and the Supreme Court of the state thought that this evidence, however weighty, was insufficient to displace the relevance of the formula. In a matter where exactness is concededly unobtainable and the feel of judgment so important a factor, we must be on guard lest unwittingly we displace the tax officials' judgment with our own. Certainly we cannot say that the combined judgment of Commission, Board, and state courts is baseless. Wherever the states' taxing authorities have been held to have intruded upon the protected domain of interstate commerce in their use of a mileage formula, the special circumstances of the particular situation, in the view which this Court took of them, precluded a defensible utilization of the mileage basis. *Union Tank Line Co.* v. *Wright*, 249 U. S. 275; *Wallace* v. *Hines*, *supra*; *Southern Ry. Co.* v. *Kentucky*, 274 U. S. 76. No such circumstances are here presented.

This brings us to the Company's claims under the Fourteenth Amendment. The Railway first asserts that it is a victim of such invidious discrimination in the administration of Tennessee's tax statutes as is proscribed by the guaranty of "the equal protection of the laws." The claim is founded upon the following circumstances. As we have already indicated, there are two separate modes for the assessment of property in Tennessee, each with its distinctive procedure. The property of public service corporations is assessed by the Commission; all other property by local officials. This broad classification, separating two very different types of property, has been reflected, according to petitioner's contention, by a corresponding difference in the bases of assessment. For more than forty years, so it was urged before the courts of Tennessee and later here, the county assessors have systematically valued property at far less than its true worth, while utility and railroad properties have been assessed by the Commission at full value.[1] This systematic differentiation, petitioner claims, has been continuous and state-wide in its operation; has been "repeatedly

[1] For a history of Tennessee railroad taxation, see Brannen, Taxation in Tennessee, pp. 62 *et seq.*; Robison, Bob Taylor and the Agrarian Revolt in Tennessee, pg. 123 *et seq.*

brought to the attention of the General Assembly of the State Tennessee"; has been left uncorrected by that body; and until t present case, so far as we are informed, has been unchallenged. support of its claim the Railway adduced official and unofficial r ports as well as a volume of affidavits from local assessing offici in the counties through which its lines run—all to the effect th locally assessed property was undervalued. The issue of forbidde discrimination was thus squarely raised below. But the Tennes Supreme Court did not deem petitioner's evidence sufficient overcome the presumption that in the exercise of its reviewin function, the Board had equalized assessments in accordance wit the command of state law. We should be reluctant on such a que tion to reject the state court's determination as without foundatio and there is not enough in the record to warrant its repudiatio At the bar of this Court petitioner proffered the minutes of th State Board of Equalization—not in the record—to show the ab sence of equalization. Considering the nature of the litigatio the vigor and ability with which it was contested before the Ci cuit Court of Davidson County, on motion for new trial there, o the original appeal to the Supreme Court of Tennessee and finall on petition for rehearing, it would indeed turn this Court into board of tax review if we were now to receive evidence not offere in any of the tribunals below.

But were we to take judicial notice of that which these minut were offered to show, and therefore to regard the ground taken by th state court as a strained evasion of the differentiation between utili property on the one hand and all the rest on the other, we should st find no denial of the equal protection of the laws. It must be empha sized that the Company makes no claim that its property is single out from among other public service corporations for discriminatio Its asserted grievance is common to the whole class. We must p to one side therefore all those cases relied on by the petitioner whic invoked the Fourteenth Amendment against discriminations i vidious to a particular taxpayer. *Raymond* v. *Chicago Traction C* 207 U. S. 20; *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 35 *Sioux City Bridge* v. *Dakota County*, 260 U. S. 441; *Bohler Callaway*, 267 U. S. 479; *Cumberland Coal Co.* v. *Board*, 284 U. S 23; *Iowa-Des Moines Bank* v. *Bennett*, 284 U. S. 239. All thes cases are inapposite. None denied power to a state to appl different yardsticks to different classes of property. Equally i

relevant are those cases in which this Court, because of the nature of the litigation, was construing the uniformity clause of a state constitution, and was not applying the Fourteenth Amendment. *Greene v. Louisville & I. R. Co.*, 244 U. S. 499; *Louisville & N. R. Co. v. Greene*, 244 U. S. 522. This Court has previously had occasion to advert to the narrow and sometimes cramping provision of these state uniformity clauses, and has left no doubt that their inflexible restrictions upon the taxing powers of the state were not to be insinuated into that meritorious conception of equality which alone the Equal Protection Clause was designed to assure. See *Puget Sound Co. v. King County*, 264 U. S. 22, 27.

That the states may classify property for taxation; may set up different modes of assessment, valuation and collection; may tax some kinds of property at higher rates than others; and in making all these differentiations may treat railroads and other utilities with that separateness which their distinctive characteristics and functions in society make appropriate—these are among the commonplaces of taxation and of constitutional law. The *Kentucky Railroad-Tax Cases*, 115 U. S. 321; *Pacific Express Company v. Seibert*, 142 U. S. 339; *Florida Central &c. R'd Co. v. Reynolds*, 183 U. S. 471; *Southern Ry. Co. v. Watts*, 260 U. S. 519; *Atlantic Coast Line v. Daughton*, 262 U. S. 413; *Rapid Transit Corp. v. New York*, 303 U. S. 573. Since, so far as the Federal Constitution is concerned, a state can put railroad property into one pigeonhole and other property into another, the only question relevant for us is whether the state has done so. If the discrimination of which the Railway complains had been formally written into the statutes of Tennessee, challenge to its constitutionality would be frivolous. If the state supreme court had construed the requirement of uniformity in the Tennessee Constitution so as to permit recognition of these diversities, no appeal could successfully be made to the Fourteenth Amendment. Here, according to petitioner's own claim, all the organs of the state are conforming to a practice, systematic, unbroken for more than forty years, and now questioned for the first time. It would be a narrow conception of jurisprudence to confine the notion of "laws" to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish

what is state law. The Equal Protection Clause did not writ
empty formalism into the Constitution. Deeply embedded tr
tional ways of carrying out state policy, such as those of which
tioner complains, are often tougher and truer law than the
words of the written text. Compare *Cariño* v. *Insular Governm*
212 U. S. 449, 459. And if the state supreme court chooses to c
up under a formal veneer of uniformity the established system of
ferentiation between two classes of property, an exposure of the
tion is not enough to establish its unconstitutionality. Fictions ha
played an important and sometimes fruitful part in the developme
of law; and the Equal Protection Clause is not a command
candor. So we are of opinion that such a discrimination, not
vidious but long-sanctioned and indeed conventional, would not
offensive to the Fourteenth Amendment simply because Tennes
had reached it by a circuitous road. It is not the Fourteen
Amendment's function to uproot systems of taxation inseparab
from the state's tradition of fiscal administration and ingrained
the habits of its people.

Finally, the Railway claims that the valuation of its entire syste
on the basis of which the Commission has measured Tennesse
shares, is so far in excess of "full cash value" as to offend the D
Process Clause. The details on which this claim is based are ful
set forth in the opinions below and call only for summary treatm
here. The argument basically derives from the fact that the Co
mission's valuation of petitioner's system was the same as that
the previous biennium, although numerous adverse economic fac
are alleged to have greatly reduced the property's worth. But ra
roads, unlike farms and city lots and stocks and bonds, are not
jects of exchange. The very notion of a "full cash value" for
railroad is in many respects artificial. See 1 Bonbright, The Val
tion of Property, pp. 511-632. Whatever may be the pretensions
exactitude in determining such a "value", to claim for it "scie
tific" validity, is to employ the term in its loosest sense. Compa
Chicago, B. & Q. Ry. Co. v. *Babcock*, 204 U. S. 585, 598. Thoro
canvass by the state courts found no justification for upsetting
determination of the Commission, and we could scarcely find w
rant in the record for doing so. But even assuming that there w
an over-assessment, constitutional invalidity would not follow
the needs of a state require higher taxes, the Fourteenth Amendm

certainly does not bar their imposition. The maintenance of higher assessment in the face of declining value is merely another way of achieving the same result. *Great Northern Ry. Co.* v. *Weeks*, 297 U. S. 135, does not bar the way. That is the only case, and it was decided by a sharply divided Court, in which a non-discriminatory assessment was struck down simply because it was thought excessive. Plainly, therefore, the case must have rested upon considerations peculiar to its own facts. Those are not the facts now before us. We conclude, therefore, that the Commission's over-assessment of petitioner's property, if over-assessment there was, constitutes no deprivation of any right under the Federal Constitution.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.